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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 817.

FRANCES O. WARRINER,
Petitioner,

vs.

HARRY FINK, IRVING POLLACK, MARCELLA POLLACK AND LOAN STAR, INC., Licensed and Organized to Do Business in the State of Florida, SAM KAY, MARILYN THAL, Formerly MARILYN KAY, and SIDNEY THAL, Each Individually and As Officers, Agents, Employees and Servants of Said Defendant Corporation, and All Jointly and Severally,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FRANCES OWEN WARRINER,
2663 S. W. 27th Street,
Miami 33, Florida,
In Proper Person for Petitioner.

R. L. MERRENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Opinion and Judgment below in the United States Court of Appeals, 5th Circuit, dated September 13, 1962, copy of opinion and judgment attached as appendix to this petition. Case reported, 307 F.2d 933 ... 1-2

Jurisdiction under Rule 19, sub-section (b) outlined ... 2

Opinion of the Court is in conflict with decisions of the Supreme Court of the United States in *Wells Fargo & Co.* v. *Taylor; Simon* v. *Southern Railway Company; Bell* v. *Hood; Windsor* v. *McVeigh; Angel* v. *Bullington; Wade* v. *Mayo;* and *Darr* v. *Burford* ... 2

Opinion of the Court is in conflict with decisions of other Courts of Appeal in *Johnson* v. *First National Bank, Wichita, Kansas; Hoffman* v. *Halden; Bass* v. *Hoagland; Crossman* v. *Fontainbleau Hotel Corp.; Moffet et al.* v. *Robbins; Lehman* v. *Graham; Howard et al.* v. *Ladner;* and *O'Boyle et al.* v. *B. Bevil* ... 2

Issues ... 3-4

Nature of Case ... 5-7

Proceedings in the United States District Court, in and for the Southern District of Florida ... 7-9

Statement of the Case in the Florida Courts of the original foreclosure, until January 23, 1952, when the Florida Supreme Court dismissed the Appeal, on motion to dismiss, without hearing, briefs or consideration of the merits or opinion ... 9-12

Analysis and Statement of the Controversy, subsequent to January 23, 1952, Confirmation of Sale, without Notice or Hearing, granting a deficiency; and Motion to Vacate Confirmation of Master's Sale and Master's Deed and for Leave to Redeem; Appeal and Petition for Certiorari, thereon ... 12-20

Original proceeding in the Florida Supreme Court, filed, styled, *State ex relator, Frances O. Warriner* v. *Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, and Judge Aqui-*

lino Lopez, Jr. and Harry Fink; being an Application and/or Petition for Writ of Supervisory Control and/or Other Relief, filed March 29, 1955 20

New Suit with New Defendants, filed in the Circuit Court of Monroe County, Florida, styled, *Frances O. Warriner* v. *Harry Fink, Irving Pollack, Marcella Pollack and Loan Star, Inc., a Florida corporation, Sam Kay, Marilyn Thal, formerly known as Marilyn Kay, and Sidney Thal, et al.;* being an Original Bill in the Nature of a Bill of Review; proceedings, and Appeal to the District Court of Appeal of Florida; and to the Supreme Court of Florida; each being dismissed, on motion to dismiss, without hearing on the merits; State Court remedies exhausted 21-27

Analysis and interpretations and discussion of acts of Defendant-Respondents, Fraud, denial of Due Process of Law, and the Doubly Void Judgment under attack 27-32

Analysis of the Federal Court's General Equity Jurisdiction, and the power to enjoin successful parties from enforcement of judgment, procured by Fraud, and without Due Process of Law; and analysis of *Johnson* v. *First National Bank, Wichita, Kansas; Simon* v. *Southern Railway Co.;* and *Bell* v. *Hood;* and *Wells Fargo* v. *Taylor* 32-36

Analysis and interpretation of Title 28, Sections 1331 and 1343, U. S. C. A. as Amended by the Civil Rights Act of September 9, 1957; and the Case of *Hoffman* v. *Halden* 36-37

Interpretation of Conclusion in the Opinion of the Court; available alternative State Court Remedies; and the presumption that State Courts would not be derelict in their duty; and denial of equal protection under the Law 37-39

Analysis as to "Unauthorized Stipulation" and due process of law; and the cases of *State ex rel. Personal Finance Co.* v. *Lewis* and *Windsor* v. *McVeigh;* and the effect of Court proceeding beyond the Power conferred 39-42

Analysis of Void Judgment and "res judicata", and Attacks thereon 42-43

Analysis of *Howard et al.* v. *Ladner* and *Angel* v. *Burlington*, as to Constitutional and the "merit" of a case 44-45

Undisputed Facts in the Instant Case 45-47

Analysis of *Moffeit* v. *Robbins; Johnson* v. *First National Bank, Wichita, Kansas*, citing *Simon* v. *Southern Railway*, re: method used to restrain the enforcement of judgment fraudulently obtained in state court, without due process of law; and Title 28, Section 2283, and the scope of the prohibition, its limitations and recognized exceptions 47-50

Analysis of Cases cited in the Opinion of the Court, Conversely, of *Rooker* v. *Fidelity Trust Co.* and *Sexton* v. *Barry* 51

Analysis and Interpretation, conversely, of *Manufacturer's Record Publishing Co.* v. *Lauer* and Equity Jurisdiction 51-52

Analysis and Interpretation, conversely, of *T. Smith & Son* v. *Williams*, showing Title 28, Section 2283, to be essentially a rule of comity; and Moore's Commentary on the said U. S. Judicial Code, re: Stay of Court Proceedings 52-53

Analysis and Interpretation, conversely, of *Amalgamated Clothing Workers* v. *Richman Brothers*, showing that wherever Congress has pre-empted a field by legislation 2283 must yield 53-54

Interpretation of *Lehman* v. *Graham*, re: that statute (2283), could not have literal application; and *Crossman* v. *Fontainbleau Hotel Corp.*, re: aid to jurisdiction, one of Exceptions to Title 28, Section 2283, U. S. C. A.; and *Greyhound* v. *Leadman*, re: Exceptions, and with conclusion, applied conversely to the instant case 54-56

Analysis and Interpretation of cases involving Fraud and denial of Due Process of Law, where Constitutional Rights have been protected, *O'Boyle et al.* v.

B. Bevil, Griffin v. *Griffin, Bass* v. *Hoagland,* and *Windsor* v. *McVeigh* 56-60

Analysis and Interpretation of *Hanna* v. *Home Insurance Company,* and Title 28, Section 1343 and Title 42, Section 1985, re: Original Jurisdiction in the Federal District Court 60-61

Analysis of A. L. R. 2d 456, re: Equal Protection under the Laws, and the Interpretation that: if state officers "deny to any citizen the equal protection of the laws or deprive him of his property without due process of law, the state itself does so" and such official action, comes within constitutional prohibitions 61

Analysis of A. L. R. 2d 467, Effect of allegation attacking state court judgment 61-62

Analysis of *Baker* v. *Carr,* re: federal power, and the Jurisdiction of Federal Courts 62

Analysis and Interpretation of *Wade* v. *Mayo,* re: whether a denial of certiorari is a prerequisite to resort to the District Courts for the protection of federal Constitutional Rights 63

Analysis and Interpretation of *Darr* v. *Burford,* re: Exhaustion of State Court Remedies, and whether a petition for certiorari is to be deemed a part of "state remedies" 63-65

Summary 65-66

Conclusion 66

Certificate of Service 67

APPENDIX

Opinion and Judgment A1-A8

Letter, dated November 7, 1951 ..... A9-A10

Letter, dated January 23, 1952 ..... A11-A12

TABLE OF CASES

Amalgamated Clothing Workers v. *Richman Brothers,* 75 S. Ct. 452 ..... 53, 54

Angel v. *Bullington*, 330 U.S. 183, 91 L. Ed. 832, 67 S. Ct. 657, reversed (C.C.A. 4) 150 F.2d 679 45
Baker v. *Carr*, 82 S. Ct. 691 62
Bass v. *Hoagland*, 172 F.2d 205 57
Bell v. *Hood*, 327 U.S. 678, 90 L. Ed 939, 66 S. Ct. 773 34
Brown v. *Brown*, 261 S.W.2d 492 42
Crossman v. *Fontainbleau Hotel Corp.*, 273 F.2d 720 55
Darr v. *Burford*, 70 S. Ct. 587 63
Greyhound Corp. v. *Leadman*, 112 F. Supp. 237 56
Griffin v. *Griffin*, 327 U.S. 220, 66 S. Ct. 556, 90 L. Ed. 635 57
Hanna v. *Home Insurance Company*, 281 F.2d 298 60
Hoffman v. *Halden*, 268 F.2d 280 ..... 36, 37
Howard et al. v. *Ladner*, 116 F. Supp. 783 44
Johnson v. *First National Bank, Wichita, Kansas*, 223 F.2d 31 ..... 32, 33, 48
Lehman v. *Graham*, 135 Fed. 39, 67 C.C.A. 513 ..... 54, 55
Manufacturer's Record Publishing Co. v. *Lauer*, 268 F.2d 187 ..... 51, 52
Mayflower v. *Brill*, 188 So. 205 ..... 40, 41, 42
Moffeit et al. v. *Robbins*, 81 F.2d 431 47
O'Boyle et al. v. *B. Bevil*, 259 F.2d 506 ..... 57, 58, 59, 60
Peterson v. *Peterson*, 288 F.2d 171 ..... 42, 43
State ex rel. Personal Finance Co. v. *Lewis*, 140 Fla. 86, 191 So. 295 40
Scott v. *Dilks*, 117 P.2d 700 39
Simon v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. Ed. 492 ..... 32, 33, 35, 36, 47, 48
T. Smith & Son, Inc., v. *Williams*, 275 F.2d 397 52
Wade v. *Mayo*, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647 63
Wells Fargo & Co. v. *Taylor*, 254 U.S. 175, 41 S. Ct. 93, 65 L. Ed. 205 35
Windsor v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914 ..... 40, 41, 42
Zenker v. *Zenker*, 72 N.W.2d 423 ..... 42, 43

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HARRY FINK, IRVING POLLACK, MARCELLA POLLACK AND LOAN STAR, INC., Licensed and Organized to Do Business in the State of Florida, SAM KAY, MARILYN THAL, Formerly MARILYN KAY, and SIDNEY THAL, Each Individually and As Officers, Agents, Employees and Servants of Said Defendant Corporation, and All Jointly and Severally,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable Supreme Court of the United States:

Frances O. Warriner petitions the Supreme Court of the United States for a review on certiorari, reviewing the decision of the United States Court of Appeals for the Fifth Circuit in case number 19;131, opinion rendered September 13, 1962, mandate issued October 24, 1962, in which the decision of the United States District Court in

and for the Southern District of Florida was affirmed, case reported, 307 F.2d 933, Advance Sheet, November 5, 1962.

This Court entered its Order, December 11, 1962, granting an extension of time within which to file petition for certiorari, to and including, February 10th, 1963.

The grounds upon which your petitioner seeks to invoke the jurisdiction of the Supreme Court of the United States are based upon the provisions of Rule 19, sub-section (b), as follows:

1. The United States Court of Appeals, 5th Circuit, has rendered a decision in conflict with the opinion of the United States Supreme Court in *Wells Fargo & Co.* v. *Taylor*, 1920, 254 U.S. 175, 41 S. Ct. 98, 65 L. Ed. 205; *Simon* v. *Southern Railway Company*, 1915, 236 U.S. 115, 35 S. Ct. 255, 59 L. Ed. 492; *Bell* v. *Hood*, 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939; *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914; and *Angel* v. *Bullington*, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832; *Wade* v. *Mayo*, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647; and *Darr* v. *Burford*, 70 S. Ct. 587.

2. The United States Court of Appeals, 5th Circuit, has rendered a decision in conflict with the decisions of other Courts of Appeal, in *Johnson* v. *First National Bank, Wichita, Kansas*, 10 Cir., 1955, 223 F.2d 31; *Hoffman* v. *Halden*, 268 F.2d 280; *Bass* v. *Hoagland*, 172 F.2d 205; *Crossman* v. *Fontainbleau Hotel Corp.*, 273 F.2d 720; *Moffeit et al.* v. *Robbins*, 81 F.2d 431; *Lehman* v. *Graham*, 135 Fed. 39; *Howard et al.* v. *Ladner*, 116 F. Supp. 783; and *O'Boyle et al.* v. *B. Bevil.*

3. The United States Court of Appeals, 5th Circuit, has decided an important question of Federal law which has not been but should be settled by this Court.

4. The United States Court of Appeals, 5th Circuit, has decided a Federal question in a way in conflict with the applicable decisions of this Court.

A copy of the opinion of the United States Court of Appeals, 5th Circuit, is attached hereto as an appendix to this petition for certiorari.

ISSUES.

Whether a Person Can Be Deprived of Property, Without Due Process of Law, by Fraud Practiced upon the Court?

Whether United States District Court Can Restrain the Enforcement of a Judgment Fraudulently Obtained in State Court Without Due Process of Law?

Whether United States District Court Had Jurisdiction Where Complaint Alleged That Action Arises Under the Constitution of the United States, the First, Fifth and Fourteenth Amendments, Thereof, the "Taking of Property Without Due Process of Law", and the "Denial of Equal Protection Under the Laws of the Land"; and Seeks to Restrain Defendants from Enforcement of Doubly Void Judgment Fraudulently Obtained in State Court, Without Due Process of Law?

Whether United States District Court Can Enjoin Defendants from Enforcement of Void Judgment Fraudulently Obtained in State Court, Proceeding Without Jurisdiction, Wherein Plaintiff Was Prevented by Extrinsic Fraud from Presenting Her Meritorious Defense?

Whether United States District Court Had Jurisdiction, in This Action to Recover Damages for Injury to Petitioner and her Property, Caused by Defendants in Their Wrongful Acts and Corrupt Conspiracy, Illegal Purpose and Intent to Deprive Petitioner of "Equal Protection Under the Laws of the Land", Secured by the Constitution; and by Their Fraud Practiced upon the

Court, in Obtaining the Void Judgment Complained of Herein, under Pretense of State Law?

Whether United States District Court Had Jurisdiction by Its General Equity Powers to Redress the Injuries to the Plaintiff Herein; Caused by Defendants, in Their Corrupt Conspiracy to Deprive Her of Her Property, Without Due Process of Law and by Their Fraud and Chicanery, Which Caused State Court to Render Void Judgment Complained Of Herein?

Whether United States District Court Had Jurisdiction to Enjoin the Enforcement of a Judgment of a State Court, Proceeding Without Jurisdiction and Obtained by Fraud, and Without Notice to the Judgment Defendant, Especially Where the Judgment Defendant Was Not Obliged to Attack a Void Judgment in the Court That Rendered It, But Might Institute a New and Independent Proceeding in a Court Having Jurisdiction of Her Person?

Whether Where State Supreme Court Refuses Jurisdiction on Appeal, and Dismisses Appeal Without Hearing or Opinion, Is Judgment Defendant Required to Proceed to United States Supreme Court for Relief by Certiorari Before Exhausting Alternative State Court Remedies, and the Enforcement of Her Constitutional Rights in Federal District Court?

Whether a Litigant Can Be Deprived of Her Constitutional Rights Because She Relied on the Authorities and Precedents Pertinent, and Laws Applicable and Controlling in State and Federal Courts?

Whether the Respect of a Litigant for the State Courts and Her Belief in the Presumption That They Will Not Be Derelict in Their Duty Be Allowed As the Means to Deprive Her of Her Property and Constitutional Rights?

Whether the Supremacy of the United States Constitution, and Its Guarantees of Individual Rights Shall Prevail Over the Persuasion of "Comity"?

The Cause herein is a Direct Attack on a doubly Void Judgment; and arises under the Constitution of the United States, the First, Fifth and Fourteenth Amendments, thereof, the "Taking of Property Without Due Process of Law," and the "Denial of Equal Protection Under the Laws of the Land."

> "No person shall * * * be deprived of life, liberty or property without due process of law * * *"

> "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

> Basic, fundamental, enduring * * *

These basic, fundamental, Constitutional Rights, were denied Petitioner.

The Opinion of the Circuit Court of Appeals, 5th Circuit, Affirmed the Order of Dismissal by the United States District Court, dismissing complaint on defendants' motion, for lack of jurisdiction and for failure to state a claim upon which relief can be granted.

This Complaint, a new and independent civil suit, was filed November 30th, 1960, brought for the purpose of removing a "Cloud" from the title of Petitioner's property, caused by a "Final Decree of Foreclosure" entered by State Court, proceeding without jurisdiction, without due process of law, illegally and unlawfully, without notice or hearing, evidence, testimony, proof of note, or debt, etc., by fraud practiced upon the Court, and based solely on an "Unauthorized Stipulation" obtained by misrepresentation, trickery, fraud and deceit, by these Respondents, herein, and their then Attorney, Harold Kassewitz.

That the Complaint properly alleges the above stated facts, together with the further facts, that Plaintiff had at all times pertinent, "a meritorious defense" adequate and sufficient under the law, to the said foreclosure, namely that it was "Usurious" and "without consideration", and that she was prevented from offering her defense thereto by these Respondents in a corrupt conspiracy to defraud Petitioner of her property, and "Due Process of Law and Equal Protection of the Laws of the Land".

That the Complaint further alleges that the amount in controversy far exceeds the sum of $10,000.00 exclusive of interest and Costs; and sets forth in some detail just how this Void Judgment was obtained; the subsequent employment of a new Attorney, and the immediate filing of "Motion to Set Aside Final Decree", which repudiated the Stipulation and declared it unauthorized and without the consent and approval of the Client owner of the property, and Petitioner herein; and that on being denied by the Circuit Court, an Appeal was taken to the Supreme Court, which was dismissed on motion, without hearing or Briefs, and without Opinion, and that subsequently this Petitioner sought relief repeatedly, properly, continuously, consistently, conscientiously and lawfully in the Florida Circuit, Appellate and Supreme Courts, without success, contrary to the Florida Laws, and the Constitution of the United States.

That attached to Complaint are Exhibits in support thereof, and included among them are Affidavits of Petitioner and her former Attorneys, B. R. Cisco and Leland Hyzer, which brings New Evidence showing that the said Stipulation was unauthorized and without consideration.

There is a Prayer for Relief, and asks among other things that these *Respondents* be forever enjoined from

enforcement of the said "Final Decree of Foreclosure" and that "Clear" Title to the property be restored to the rightful owner, Petitioner herein, and asks Damages for their Wrongful acts.

Complaint demands Trial by Jury.

Hearing was had on Defendants' Motion to Dismiss, before the Honorable Joseph P. Leib, Judge of the United States District Court; and Defendants' Attorney in support of their motion claimed: "that if Plaintiff didn't seek Certiorari from the United States Supreme Court, she could not institute a new and independent suit in the United States District Court, attacking a void judgment entered without due process of law"; Defendants' Attorney was without any "authority" to substantiate his contention, and the Court allowed him time to secure it, if any; and for Plaintiff to reply, and present "Authorities".

Defendants filed their Brief, and offered then, a new reason "that the Court lacks jurisdiction", Title 28, Section 2283, of the United States Code Annotated, and *Toucey* v. *New York Life Insurance Co.*, 62 S. Ct. 139, as their principal authority, as cited in *Sexton* v. *Barry*, 233 F.2d 220, ignoring the scope of the prohibition, its limitations and exceptions, and as a basis for this, a portion of Plaintiff's alternative Prayer for Relief was quoted, out of context, and "res judicata" was claimed by setting forth the many times Plaintiff had sought Justice in the State Courts, without success, whereby Defendants considered the said void judgment, to have been affirmed, confirmed and ratified.

Reply Brief of Plaintiff was filed, citing *Wells Fargo & Co.* v. *Taylor*, 41 S. Ct. 93 and *Simon* v. *Southern Railway Co.*, 35 S. Ct. 255, each showing that a Federal Court can enjoin the enforcement of a judgment rendered by

State Court on a showing that it was obtained by fraud or for some other reason it was inequitable to enforce it; especially where "the judgment debtor was not obliged to attack a void judgment in the court that rendered it, but might institute a new and independent proceeding in a court having jurisdiction of his person", and also citing other cases, showing that where a person's federally-protected civil or constitutional rights are abridged, resort to a federal court may be had without first exhausting the Judicial remedies of State Courts", and others which showed jurisdiction was vested in the Federal Court, included, was *Bell v. Hood*, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773; and in reply to Defendants' new contention, Plaintiff stated that the principal case upon which Defendants rely, *Toucey* v. *New York Life Insurance Co.*, as cited in *Sexton* v. *Barry*, was no longer effective, as is made abundantly clear under the New Federal Judicial Code, Title 28, Section 2283 (2 and 3), of the United States Code Annotated, as follows:

> "Exceptions to prohibition developed by judicial construction held violative of the statute in Toucey v. New York Life Insurance Co.; Excepting clause of present section 'restores' the basic law as generally understood and interpreted prior to the Toucey decision"; etc. (R. 103-118).

That Denial of Equal Protection under the Laws of the Land, was shown by numerous citations where others were accorded different treatment on the same points of law; and it was pointed out, that a Void Judgment has no legal force or effect from its inception, and is forever and continues to be a nullity, ineffectual to bind parties or support a right, incapable of confirmation, ratification, or enforcement.

Order of Dismissal was entered by the Honorable Joseph P. Leib, Judge of the United States District Court.

Plaintiff filed many Motions to Amend her Complaint, once as of right; and to Amend Prayer for Relief; for Rehearing, and for Hearing on her Motions, etc., all were denied, without a hearing.

This Controversy arose from a usurious mortgage, and State Court proceedings thereon. They can be best understood by stating them in the chronological order, as so carefully analyzed in the Opinion of the United States Court of Apeals, 5th Circuit, as follows:

> "On August 17, 1948, the plaintiff executed a mortgage on certain very valuable lands located in Monroe County, Florida, in the amount of $10,000.00. The mortgage was actually to Sam Kay, but was taken in the name of his brother-in-law, Morris Resnick. Kay knowingly exacted interest in excess of 25% in violation of Florida Statutes 687.07. The complaint alleges that a proper application of payments and credits would completely extinguish and discharge the debt.
>
> "On January 31, 1950, the plaintiff executed a rewritten mortgage for $10,500.00 founded upon the same debt. Kay agreed to give her $3,000.00 previously withheld and an additional $500.00, but later refused to do so. While the mortgage was rewritten by Sam Kay and he was the real party in interest, it was taken in the name of Henry H. Herman. The rewritten mortgage was without any consideration moving to plaintiff. Sam Kay was at all times the real party in interest, and Henry H. Herman, Marilyn Kay, Harry Fink and others conspired with Sam Kay to perpetrate a fraud on the plaintiff. On February 21, 1950, Herman transferred the mortgage to Marilyn Kay. On July 26, 1950, Marilyn Kay transferred it to Harry Fink. On October 26, 1950, Harry Fink filed his bill to foreclose the mortgage in the Circuit Court of Monroe County, Florida.

"The plaintiff, Frances O. Warriner, employed an attorney to defend the foreclosure suit, and filed an answer admitting the residence and age of the parties but denying all other allegations. The complaint alleges:

" 'That on December 22, 1950, just three days before Christmas, Cisco (Mrs. Warriner's attorney), was tricked into a stipulation with Harold Kassewitz, attorney for Harry Fink, who concocted an unauthorized stipulation intended and calculated to deprive the plaintiff herein, of her constitutional rights, of due process of law; and which, in effect, waived all of her substantial rights; erroneously, unlawfully and irregularly, without her knowledge, consent or approval, and was unauthorized as these attorneys then knew; and that the plaintiff herein was thus defrauded out of an opportunity to present her meritorious defense in the original action thereby, to her great damage and injury.'

"Attached to the complaint are affidavits of both of plaintiff's former attorneys. Attorney Cisco's affidavit reads as follows:

" 'In that certain cause pending in the Circuit Court of the Eleventh Judicial Circuit in and for Monroe County, Florida, in Chancery, No. 12-516, entitled "Harry Fink, Plaintiff, vs. Frances O. Warriner, Defendant", upon request of the defendant I prepared an answer to the Bill of Complaint filed in the above entitled cause and traversed said bill placing plaintiff upon due proof to establish the allegations of said Bill of Complaint; had I known at said time that a special defense, to-wit usury, was involved, I would have set same up in said answer.

" 'Thereafter, I entered into a stipulation with Harold Kassewitz, attorney for plaintiff, and at his request, wherein and whereby final decree could be entered by the Court having jurisdiction of the subject matter of the suit and that the sale of the prop-

erty was to be postponed beyond the time of the due process provided under the statutes and rules of the Court.

" 'The sole purpose and consideration (as cited in said stipulation) for the execution of said stipulation was to give the defendant an extension of time prior to the sale date within which to either pay the indebtedness, bid at the sale or refinance her property. The record shows that no additional time beyond the statutory period was, in fact, extended to said defendant, which was not the purpose of such stipulation or the agreement between counsel.

" 'In addition the stipulation did not waive the necessity on the part of the plaintiff to introduce evidence to establish the debt sued upon, that is to say, the introduction into evidence and proof of the note or notes and mortgage securing same.

" 'I have no independent recollection, nor have I any notes or records as to whether or not the stipulation was discussed by me with Mrs. Warriner, but in any event it would have never been executed by me except with the express understanding that a reasonable period of time was to be given to the defendant beyond the time which was allowed under the statute.'

"Relying upon the fraudulent stipulation, the court on December 28, 1950, entered a final decree finding Mrs. Warriner's indebtedness under the mortgage to be $11,458.40 plus $31.85 cost of abstract, plus $750.00 attorney's fee, and ordering the property sold by a special master to the highest and best bidder on February 5, 1951. At that sale Harry Fink became the purchaser 'for the egregiously low sum of $1,000.00'. The Plaintiff had been kept in ignorance of the fraudulent stipulation, the final decree and the sale.

"As soon as the plaintiff learned of those events, she employed other counsel, repudiated the unauthor-

ized stipulation, and on March 6, 1951, filed her motion to set aside the final decree and the master's sale, and requested that she be allowed to offer her defense to the bill of foreclosure. The court on September 20, 1951, granted the motion to set aside the sale, but denied the motion to set aside the final decree, and thus deprived plaintiff of her right to defend against the bill of foreclosure. The master conducted another sale on October 15, 1951, and Harry Fink again became the purchaser, but this time 'for the egregiously low sum of $5,000.00'. The master filed his report of sale on October 22, 1951, and a motion for confirmation was set for hearing on November 9, 1951, but was not heard because plaintiff's then attorney, Leland Hyzer, filed a notice of appeal the preceding day."

"The transcript of record was filed in the Supreme Court of Florida on January 10, 1952. Two days later Harry Fink, the appellee, filed a motion to dismiss the appeal in which he undertook to deceive the Court into ruling that the appeal was from the decree of December 28, 1950, when in reality it was from the order of September 20, 1951. Plaintiff's then attorney, Leland Hyzer, wrote a letter to the Clerk of the Supreme Court of Florida explaining that, 'the notice of appeal was taken from that portion of the Circuit Court's order denying the motion to set aside the final decree' and that, 'it is our position that the record has been properly filed in accordance with Rule No. 12.' Nonetheless, the Supreme Court of Florida on January 23, 1952, dismissed the appeal without any consideration of the merits, but sustaining Harry Fink's motion that the transcript of the record was not filed within time."

At this point in the Court's Opinion, as to the Statement of the Case, it appears important to mention that the Circuit Court of Monroe County had entered its "Order Extending Time" for filing the transcript of record on appeal for ten days from the date of the order of January 3,

1952 (R. 66); also see letter (R. 68 and 69), so that it was timely filed, being filed January 10, 1952 (R. 13-15).

On January 23, 1952, the Supreme Court of Florida dismissed the said "Appeal" without Hearing or Briefs on the Merits, and without "Opinion", so that there was no way of knowing the Court's reason for the said dismissal (R. 70).

The Supreme Court of Florida had simply refused to take Jurisdiction.

The United States Court of Appeal, 5th Circuit, in its Opinion, herein, contends:

> "* * * that when the plaintiff failed to seek review by the Supreme Court of the United States of the judgment of the Supreme Court of Florida of January 23, 1952, dismissing her appeal, she lost the only avenue of relief available to her in the federal courts."

This appears completely wrong to Petitioner.

In Fink's "Motion of Appellee to Dismiss", in paragraph (3) (R. 67), it suggested that: "at the time said Motion (to vacate and set aside final decree) was filed, the only method for attacking said final decree was by a new Bill of Complaint, in the nature of a Bill of Review."

On February 12, 1952, Leland Hyzer, Petitioner's then Attorney, filed a new suit in the Circuit Court of Monroe County, in the nature of a Bill of Review, together with Lis Pendens, Case No. 12-1172; on March 7, 1952, Fink filed Motion to Dismiss; which was denied by the Circuit Court of Monroe County, Florida on June 25, 1952, which also said: "that the Defendant shall have twenty days from date within which to file his Answer"; he thereupon sought Certiorari from the Supreme Court of Florida, claiming res judicata, because of the so-called Appeal, which had not been heard; on these alleged grounds:

"(a) the bill fails to state a claim upon which relief can be granted,

"(b) the bill fails to set forth such facts which might constitute the type of fraud justifying the relief sought, and

"(c) any errors alleged to have occurred in the mortgage foreclosure suit cannot be availed of, since the Final Decree of Foreclosure has become final and absolute, the time within which an appeal could have been presented from said Final Decree having expired."

On January 20, 1953, the Supreme Court of Florida granted Certiorari, and held (R. 189-192):

"We hold that the lower court was in error in denying the motion to dismiss the complaint. The question of whether the solicitor for Warriner had the authority to enter into the stipulation was the very basis of the motion to set aside the original decree and this was decided adversely to her. This order finally determined that question and as between these parties it is res adjudicata. So also is the question of the credit of interest. This question could and should have been raised in Warriner's original motion. Her failure to do so—when it was proper to raise it—does not affect the application of this Rule. *Gordon* v. *Gordon*, 59 So.2d 40.

"Having decided that the lower court should have dismissed the complaint for the reasons above stated, we do not pass upon the other points raised.

"Accordingly the petition for certiorari is granted and the order appealed from is quashed with directions to dismiss the complaint."

(Above from Judge Drew's opinion.)

"SEBRING, J. (concurring in conclusion and judgment only).

"I agree that the motion to dismiss the bill of complaint should have been granted, for the reason that plaintiff failed to show in her motion to vacate the final decree and set aside the master's sale in the foreclosure suit that she had any meritorious defense to the foreclosure of the mortgage. I cannot agree, however, that the doctrine of res judicata is applicable. Hence, I concur in the conclusion and judgment only."

If the matter was "res judicata" then the Supreme Court of Florida, should have heard the said "Appeal", which was dismissed without hearing.

Jan. 26, 1953 Corrective Deed, was executed by the special Master, without notice or hearing. also; which said, in part:

"This deed is given to correct an error in the description contained in that certain deed between the same parties hereto, dated January 30, 1952, recorded in Deed Book G-59, pages 512 and 513, of the Public Records of Monroe County, Florida."

On February 20, 1953, Motion for Rehearing was denied.

Thereupon, Tender was made for the full amount of the outrageous Final Decree, which was refused (R. 23), and it was then disclosed and Petitioner and her then Attorney, Leland Hyzer, learned for the first time that the Circuit Court of Monroe County had entered its Order Confirming Sale, on January 29, 1952, without Notice or Hearing; and that a Master's Deed was recorded January 30, 1952, with a faulty legal so that it did not appear of record against the property for more than a year, when a corrective deed was given, January 26, 1953, all without notice or hearing, surreptitiously (R. 15-16).

That the said Order Confirming Sale, which also granted a Deficiency Decree, was accomplished by cun-

ning and deceit, calculated and intended to deceive the Court, by two letters, the first, dated November 7, 1951 (R. 15-16) (A. 2), after Fink's then Attorney, Harold Kassewitz, had agreed that neither would be at the Hearing because of the Appeal; and the second, after Appeal was dismissed without hearing, dated January 23, 1952, the same day (R. 15-16) (A. 3), Note: no copy of said letters was sent to either Petitioner or her then Attorney; and no mention was made either by the said Attorney or the same presiding Judge, all through the new suit filed, in the nature of a Bill of Review, until Tender was made, after Certiorari was granted and rehearing was denied, more than a year thereafter.

On April 7, 1953, Motion to Vacate Confirmation of Master's Sale and Master's Deed and for Leave to Redeem. was filed, excerpts of which follow:

> "4. That no hearing on the plaintiff's motion for confirmation of master's sale was held on November 9, 1951, pursuant to said notice; that a notice of appeal from the aforesaid order dated September 20, 1951, was filed November 10, 1951, appealing said order to the Supreme Court of Florida; that pending said appeal, no order of confirmation of the master's sale was entered; that the Supreme Court of Florida granted the motion of the appellee, Harry Fink, to dismiss the appeal and said appeal was dismissed.
>
> "5. That on some date subsequent to January 21, 1952, Harry Fink, the plaintiff in the above styled cause, brought on for hearing before the Court the motion for confirmation of the master's sale without notice to the defendant and an order confirming the master's sale and authorizing the execution of a master's deed was entered without the knowledge of the defendant, Frances O. Warriner."

* * *

"8. That the defendant is in a position and has offered to pay to the plaintiff, Harry Fink, the amount of the final decree but that said payment has been refused; that the defendant is still ready, able and willing to pay the amount of the final decree for the redemption of said property.

"9. That the defendant did not discover the entry of the order of confirmation or the execution of the master's deed until the latter part of February, 1953, after the plaintiff refused the money for the redemption of the land covered by the mortgage.

"10. That the defendant is informed and believes and therefore, states that the plaintiff, Harry Fink, has delivered a deed to said property to one Irving Pollack, but that said recorded deed is not a bona fide conveyance or sale of said property."

Sept. 18, 1953 Circuit Court of Monroe County, denied the said Motion to Vacate Confirmation of Master's Sale and Master's Deed and for Leave to Redeem.

Oct. 6, 1953 Petition for Rehearing was filed, and

Oct. 8, 1953 Supplemental Petition for Rehearing was filed, both, in part, as follows:

Excerpts from Petition for Rehearing filed October 6, 1953:

"6. The Court did not give sufficient weight to the fact that during the pendency of the original foreclosure proceedings and of the suit in the nature of the bill of review, the plaintiff and plaintiff's attorneys represented to the defendant that she could redeem the property from the decree of foreclosure and that at no time during the pendency of said two suits nor when said representations were made concerning redemption did the plaintiff or his attorneys intimate or notify the defendant that the master's sale had been confirmed or that a master's deed had been exe-

cuted and delivered by the master to the plaintiff; that not until the Supreme Court of Florida had denied a petition for rehearing on certiorari in the suit for Bill of Review on February 20, 1953, when the defendant offered to pay the amount of the decree and redeem the property did the plaintiff notify the defendant that an order of confirmation of Master's sale had been entered on January 29, 1952, and a master's deed executed and delivered.

"7. That equity justifies the vacating of the order confirming master's sale and master's deed and allowing redemption in view of the contention of the defendant that Final Decree of Foreclosure was entered on an unauthorized stipulation, that the original note and mortgage sought to be foreclosed was never offered in evidence and that proper amount of indebtedness was never established.

"8. That because of the irregularities in the entire proceedings, particularly in the entry of the order of confirmation of master's sale without notice, the defendant is being deprived of her property without due process of law."

Excerpts from Supplemental Petition for Rehearing filed October 8, 1953:

"Comes now the Defendant, Frances O. Warriner, and files this Supplement to her Petition for Rehearing on the Motion and Order to Vacate Master's Sale and Master's deed and for Leave to Redeem, and for further ground, says:

"That equity further justifies the vacating of the order confirming sale and Master's deed and allowing redemption for the reason that the deed referred to in Par. 10 of the Defendant's motion to vacate shows revenue stamps indicating a purported consideration of $10,000.00. A photostatic certified copy of said deed dated January 28, 1953 and recorded in Deed Book

G-67 pages 200/201 Public Records Monroe County, Florida, is attached hereto and made a part hereof marked Exhibit A. The Master's Report of Sale held October 15, 1951, dated October 22, 1951, shows the total amount due under the provisions of the Final Decree, as of October 15, 1951, to be $12,826.51 plus costs recited therein. The Defendant has offered to redeem the property by paying to the Plaintiff the said amount recited in the said Master's Report plus legal interest, less the sum of $525.00 paid by the Defendant on account of interest, which amount exceeds the amount of the purported consideration shown in the aforesaid deed."

Almost a year later, on September 9, 1954, the Circuit Court of Monroe County, entered order denying the said Petition and Supplemental Petition for Rehearing, of Motion to Vacate Confirmation of Master's Sale and Master's Deed and for Leave to Redeem. (Order Confirming Sale had also granted a deficiency decree of $6,957.51, with legal interest from October 15, 1951.)

Subsequent events in chronological order, in brief, follow:

Sept. 28, 1954	Notice of Appeal from the Order dated Sept. 9, 1954, was filed in the Supreme Court of Florida.
Nov. 18, 1954	Petitioner's then Attorneys, Leland Hyzer, and Leo Julian, her additional Attorney (R. 186), filed Petition for Writ of Certiorari, in the Supreme Court of Florida.
Dec. 1, 1954	Fink's Attorney filed Motion to Dismiss Appeal and Certiorari Proceedings, and Brief of Appellee-Respondent (A. 5).
Dec. 9, 1954	The "Two Letters", dated Nov. 7, 1951 and Jan. 23, 1952, on which the Order Confirming Sale, was granted, were only

then filed with the Clerk by the presiding Judge, Aquilino Lopez, Jr., who had withheld them from the file (A. 2 and A. 3).

Jan. 5, 1955 The Supreme Court of Florida denied Petition for Writ of Certiorari, without opinion. (R. 188-191).

Jan. 12, 1955 Irving Pollack and Marcella Pollack executed a Deed to the said Property, to Loan Star, Inc., a corporation existing under the laws of the State of Florida; Secretary of State, showed: Sam Kay, President, 420 Lincoln Road, Miami Beach, Fla., Marilyn Thal, Secretary-Treasurer, 6580 Allison Road, Sidney Thal, same, Vice President.

Jan. 27, 1955 Petition for Rehearing was denied (R. 191).

Feb. 3, 1955 Deed to Loan Star, Inc., a Florida corporation, was Recorded, in Monroe County, Florida. (The circle of fraud was complete, Sam Kay, the real party in interest, had the Title in the name of his corporation.)

Mar 29, 1955 Petitioner, in proper person, perpared and presented to the Attorney General, Richard Ervin, a complaint for an original proceeding in the Supreme Court of Florida, styled, State Ex Relator Frances O. Warriner, vs. Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida and Judge Aquilino Lopez, Jr., and Harry Fink; being an Application and/or Petition for Writ of Supervisory Control, and/or other Relief (R. 189-193).

The average American Citizen believes that this country is ruled by laws, not men. They have faith in

the American system of justice. They are confident that the individual can rely on the courts to uphold their rights and correct any wrongs which may be committed against them, by public officials or anyone else.

The foregoing Application for Writ of Supervisory Control and/or Other Relief, was filed by Petitioner, confident and firm in the belief that if the Supreme Court of Florida was given the facts, they would not be derelict in their duty, and her Constitutional Rights would be protected and upheld (R. 191-193).

May 31, 1956 More than a year after filing, the Supreme Court of Florida denied the said Application for Writ of Supervisory Control and/or Other Relief, without opinion.

June 12, 1956 Petitioner filed Request for Determination En Banc of her Petition for Rehearing and for Review on Application and/or Petition for Writ of Supervisory Control.

June 14, 1956 The Supreme Court of Florida denied the said Petition.

July 27, 1956 The Supreme Court of Florida denied Petition for Rehearing.

Sept. 18, 1956 The Supreme Court of Florida denied Motion for Leave to filed Extraordinary Motion for Petition for Rehearing and Review.

The Supreme Court of Florida refused again to take Jurisdiction.

Oct. 25, 1956 Petitioner, in proper person, after conferring and seeking advice of friends and attorneys in Washington, D. C., as to procedure, etc. (R. 192), filed in the Circuit Court of Monroe County, Florida, *a new suit*, against, Harry Fink. Irving

	Pollack, Marcella Pollack and Loan Star, Inc., a Florida corporation, Sam Kay, Marilyn Thal and Sidney Thal, each individually and as officers, agents, employees and servants of said defendant corporation, and all jointly and severally, Defendants, entitled, Original Bill in the Nature of a Bill of Review, and/or Other Relief, together with Lis Pendens.
Nov. 21, 1956	Loan Star, Inc., a Florida corporation, Sam Kay, Marilyn Thal and Sidney Thal, filed Motion to Dismiss, claiming, complaint did not state a cause of action.
Nov. 26, 1956	Harry Fink, filed Motion to Dismiss, claiming, that the matters are res judicata.
Nov. 26, 1956	Irving Pollack and Marcella Pollack, filed Motion to Dismiss, claiming, complaint did not state a cause of action.
Sept. 24, 1957	Petitioner filed Notice of taking of the Depositions of Harry Fink, Irving Pollack and Marcella Pollack, set for October 3, 1957.
Oct. 3, 1957	At the place where the Depositions were set to be taken before the notary, Petitioner, was served by all, with either, Motion to Suppress or to Terminate the Taking of their Depositions.
Oct. 15, 1957	Petitioner filed Motion for Discovery and the Production of Documents, and Motion to Strike and to Require Defendants, therein, to Answer and/or to Defer Ruling on Motion to Dismiss until their Depositions, previously set for October 3, 1957, were taken, set down prior to the hearing on Motion to Dismiss.
Oct. 16, 1957	Hearing on all pending motions, set down, but only Defendants' Motions to Dismiss, was heard or considered by the Court,

with Petitioner appearing in proper person, and Mr. King, of Sibley, Grusmark, Giblin, King & Levinson, herein, representing all of the defendants, except Harry Fink, who was not represented, the Court referring to a letter. (Not in the File, nor served upon Petitioner.)

March 5, 1958 Order Dismissing Complaint was entered by the Circuit Court, once more the Court had Dismissed the Cause, without consideration of the merits, without testimony, without evidence, and without this Petitioner being permitted to take the Depositions of the Defendants therein, which was her right; thus preventing the facts and the evidence to be presented to the Court, although, the Judgment that had been previously rendered was void; obtained by fraud; without proof of note or mortgage; and wherein the Circuit Court had proceeded without Jurisdiction; and although New evidence and proof was properly alleged, as was fraud practiced upon the Court, Conspiracy of the New Defendants, new to the controversy, including the "Real Party in Interest", Sam Kay, and the Usury being clearly shown.

March 15, 1958 Petition for Rehearing and Motion to Vacate Order Dismissing Complaint was filed, which brought to the attention of the Court among other things, that a *Void Judgment is not res judicata of anything ! !* and that the attack here is a direct attack on the said Judgment claimed to be "Res Judicata"; and that a void judgment has no legal effect, and may be attacked *directly* or *collaterally* at *any time*, and is incapable of confirma-

tion or rectification; and that in case of direct attack that Judgment was procured by Fraud, as is the case here, *doctrine of "res judicata" is not applicable.*

The Circuit Court of Monroe County, in its Order Dismissing Complaint, of the New Suit with New Defendants, held:

"(g) This Court finds that the Complaint herein does not state a cause of action and that the matters and things alleged are res adjudicata having been determined and set at rest by Chancery Cause No. 12-516, Chancery Cause No. 12-1172, both of which were appealed to the Supreme Court of Florida and by the entry of the orders of the Supreme Court of Florida in the original proceedings filed March 26, 1955 as heretofore described, and the Court being fully advised in the premises, it is therefore

Ordered, Adjudged and Decreed that the complaint filed herein be and the same is hereby dismissed with prejudice.

May 2, 1958	Notice of Appeal to the District Court of Appeal of Florida, Third District, was filed.
Oct. 21, 1958	The District Court of Appeal of Florida, Third District, quashed Petitioner's Appeal, on Motion to Quash, filed for all Appellees, by Sibley, Grusmark, Barkdull & King, and for Harold Kassewitz without opinion.
Nov. 19, 1958	District Court of Appeal of Florida, Third District denied Petition for Rehearing.
Jan. 14, 1959	Notice of Appeal to the Supreme Court of Florida, was filed.
March 4, 1959	Supreme Court of Florida, dismissed Appeal, on Motion to Dismiss, "on authority of *Lake* v. *Lake*, 103 So.2d 639.

April 23, 1959 District Court of Appeal of Florida, Third District, denied Petitioner's Extraordinary Petition for Review, and/or for Clarification of Opinion.

May 21, 1959 District Court of Appeal, Third District, ordered, "petition for rehearing and notice of intention to petition the Supreme Court for a writ of certiorari be and they are hereby stricken.

It is further ordered that any further such unauthorized petitions for rehearing or similar pleading, if presented in this above styled cause, shall be stricken upon presentation.

July 11, 1959 Circuit Court of Monroe County, entered Order Discharging Lis Pendens.

Aug. 29, 1959 Notice of Interlocutory Appeal, to the Supreme Court of Florida, of Order Discharging Lis Pendens, was filed.

Aug. 29, 1959 Petitioner filed in the Supreme Court of Florida, her, Petition to Open, Vacate and Set Aside Opinion, filed January 20, 1953, and to Declare Void and of no Force or Effect.

Oct. 7, 1959 The Supreme Court of Florida, held:

"Per Curiam.

"The Court has duly considered the petition 'to open, vacate and set aside its Opinion filed, January 20, 1953, and to declare void and of no force or effect' and concluding that the same is frivolous and wholly without merit and presents no matter for the consideration of this Court, it is

"Ordered that said petition be and the same is hereby denied and hearing heretofore set before this Court on said petition for Monday, October 19, 1959, is hereby cancelled."

Oct. 21, 1959 Petitioner filed in the Supreme Court of Florida, Suggestion and/or Petition for Rehearing on Reconsideration and Request for Oral Argument, and for the Original Record to be sent to the Supreme Court in its Consideration of this matter, which said, in part:

"3. That the point of law involved herein has been previously determined by this Florida Supreme Court, in the case of *Mayflower* v. *Brill*, 188 So. 205, in which is cited the same opinion, on the same point of law, by the United States Supreme Court, in the Case of *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914, and it appears inequitable and unfair to this Respondent to be forced to take this matter to a higher Court, the additional expense and litigation, the time and trouble, in order to have Justice done, when this Honorable Court is capable of opening, vacating and setting aside its Opinion, improperly entered, dated January 20, 1953, and granting a trial in this matter which is her right, and which will be clearly apparent to this Honorable Court, upon careful consideration of this entire matter.

"4. That this Respondent requests an opportunity to appear and be heard, in Oral Argument, before determination by this Court."

Oct. 25, 1959 Petitioner filed her Notice of Intention, in the Supreme Court of Florida, "that it is her INTENTION, if the relief sought in this Court is not secured, to proceed to the Higher Court, either the Federal District Court, or the United States Supreme Court, as this suit involves the Constitutional Rights of this Respondent."

Dec. 16, 1959 The Supreme Court of Florida, held:

> "The Court sua sponte has examined the record in this purported interlocutory appeal in this cause and, finding therefrom that this Court is wholly without jurisdiction in said cause, the same is hereby dismissed with prejudice."

Dec. 18, 1959 The Supreme Court of Florida, entered its last order, also without hearing, which says:

> "This cause was concluded by a rendition of the opinion of this Court January 20, 1953, and the expiration of the term of this Court in which said opinion was rendered.
>
> "Respondent Frances O. Warriner's Motion and/or Petition for Recordation of Respondent's Suggestion and/or Petition for Rehearing or Reconsideration and Request for Oral Argument and for the Original Record to be sent to the Supreme Court in its Consideration of this Matter' and her request for oral argument thereon is hereby denied and the Clerk of this Court is hereby directed not to accept for filing any further purported pleadings or documents in said cause."

State Courts remedies seem to have been pretty well exhausted—, or rather denied.

It will be remembered that the "Appeal" taken in the foreclosure suit was dismissed on motion, without hearing or Briefs, January 23, 1952 (R. 65 to 70), and that subsequently the same Supreme Court granted Certiorari, January 20, 1953, quashing with directions to dismiss the said Bill of Review Suit, as *"res judicata"* by virtue of the said "Appeal"; although, had that been the case then the Supreme Court should have heard the said "Appeal"; and the said foreclosure suit had not then been concluded, as the Order Confirming Sale, was only then discovered.

Nov. 30, 1960 The instant suit was filed in the United States District Court, Southern District of Florida, Miami Division, together with Lis Pendens.

Dec. 19, 1960 Motion to Dismiss, was filed by all Defendants, on the following grounds:

"1. The complaint fails to state a cause of action upon which relief can be granted.

"2. This Court lacks jurisdiction over the subject matter of this litigation."

Mar. 1, 1961 Order of Dismissal, was entered without opinion.

April 7, 1961 Notice of Appeal to the United States Court of Appeals, Fifth Circuit, was filed.

The Respondents' interpretation of the instant suit and the relief sought herein, and previously, has, in each instance, been a distortion. A calculated deception of implied propriety, where none existed, half truths and hearsay, giving what purported to be a "chronological order of events in this controversy", of seeming judicial consideration, litigation and adjudication, as a sort of red herring, to mislead the Court, into a review from the meager information, which said too much or too little, mostly hearsay, incomplete and inaccurate, and replete with omissions such as, the "Answer, filed November 28, 1950," which denied the debt, and all other material allegations; and the "Stipulation" surreptitiously filed simultaneously with the offensive Final Decree of Foreclosure, December 29, 1950 (R. 38-39, 40 and 41-46) and "Motion to Set Aside Final Decree", filed March 6, 1951 (R. 52-55), and not heard until September 20, 1951; or the fact, that the deceit and chicanery continued; and that the "Order Confirming Master's Sale" was also surreptitiously entered with-

out notice or hearing (R. 15-16), and the Deed of Conveyance had a faulty legal so that it would not appear against this property, while the Bill of Review Suit was in progress, both unknown to Petitioner or her then Attorney for more than a year, when the Supreme Court of Florida, quashed the said Bill of Review Suit, January 20, 1953, and legal tender was made for the full amount of the outrageous final decree; and then a "Corrective Deed" was granted, also without notice or hearing (R. 15), and so on and on, implying along the way, that there were "innocent purchasers" and that all was proper, as an example, is an excerpt from Respondent's pleading December 1, 1954, in the Certiorari proceeding on Order Confirming Sale, which says, in part (See A. A9 and A11):

> "Petitioner simply pulls out of the air a legal principle that is fundamental and firmly settled. Petitioner innocently asks whether an order confirming sale and decreeing a deficiency may be entered without notice and without a hearing. Would any lawyer or judge differ from the foregone conclusive answer to this simple question? Certainly, we concede that notice and hearing are essential. But does this Court suppose for a moment that Judge Lopez, the Chancellor below, would order confirmation and award a deficiency decree without notice to the defendant and without giving the defendant an opportunity to be heard.
>
> "No, the question here is: Where notice is duly given for a hearing on a motion for order confirming sale and for entry of a deficiency decree, is the Chancellor without power to enter such order at a later date? The answer is clear. It is almost a daily occurrence for a Judge to hear a matter on one day and then not actually enter the order of decision until a later date.

"The record here shows that notice was duly given for a hearing on November 9, 1951, upon plaintiff's motion for confirmation of master's sale and deficiency decree. The record also shows that on January 29, 1952, the Order confirming sale and decreeing a deficiency was entered. There is a total absence of any *evidentiary* record which would be sufficient to overturn the presumptive regularity of the lower court's Order."

The "Two Letters", dated, November 7, 1951 (A A9), and January 23, 1952 (A. A11), only thereafter filed, December 9, 1954, are now *"evidentiary"* of his chicanery and audacity.

In the United States Court of Appeals, Fifth Circuit, these Respondents, therein also implied propriety, that the matters were regularly tried and determined; that Petitioner was seeking a *review* of orders, judgments and decrees of the Circuit Court, District Court of Appeal and Supreme Court of Florida; and *an injunction to stay proceedings in State Court*, and citing cases having no application to the instant suit, and as to Petitioner's Constitutional Rights, alleged:

"The plaintiff-appellant takes the position, in her brief, that the combined weight of the trial and appellate courts of the State of Florida has been invoked by these appellees to deny her rights guaranteed by the Federal Constitution. The United States Constitution does not guarantee to any litigant the right to the results she wishes, merely that she be provided an appropriate forum within which to air her grievance."

Contrary to Respondents' above "Conclusion", is:

"Constitutional guaranty of equal protection of law guarantees fundamental rights, not mere forum which state may see proper to designate for enforce-

ment and protection of such rights". Const. United States Amendment XIV. *Phillips Petroleum Co.* v. *Smith*, 61 P.2d 184, 177 Okla. 539, 107 A.L.R. 858.

These Courts have denied relief and have given scant attention to the wrong done or the denial of Petitioner's Constitutional or Civil Rights, each proceeding being, *dismissed, quashed* or *denied, on* Respondents' motion to dismiss, as herein. There has been no "litigation"; "adjudication", and never any hearing on the "merits", nor have Respondents ever been required to "Answer"; and, as to the "combined weight of the trial and appellate courts of the State of Florida", if the facts and their actions reflect adversely, it is these pure facts and their actions, and not Petitioner's statement of them that make it so.

There was no notice, no hearing, no opportunity of being heard, no due process of law, no trial, no evidence, no testimony, the Final Decree of Foreclosure was obtained solely by the unauthorized stipulation and fraud practiced upon the Court which prevented this Petitioner, (then Defendant) from offering her meritorious defense thereto.

This doubly void judgment, herein under attack, thus obtained by fraud without due process of law, and wherein Petitioner was also denied equal protection under the laws of the land—can be attacked *directly* or *indirectly*, *directly* or *collaterally*—either State Court or in the Federal District Court alike. No proceeding is now pending in State Court, and no injunction is sought or needed to stay proceedings in State Court, nor were any proceedings then pending, at the time of the filing of this instant suit, November 30, 1960 (R. 128-130).

The Federal and Equitable Jurisdiction of the District Court is sought herein to enjoin these *Respondents* from using that which they call a Judgment, but which is in

fact and in law, a mere nullity; and to restrain them from enjoying the fruits of the said judgment fraudulently obtained in State Court by their purposeful, corrupt conspiracy to defraud and deprive Petitioner of her property without due process of law; and where due process *was* denied Title 28, 2283, U.S.C.A., Exceptions 3.3, Injunction to restrain enforcement of judgment fraudulently obtained in State Court (R. 106).

Contrary to Respondents' contention, there is only *one* judgment herein being attacked; and there need be only *one*, as all subsequent orders, rulings, conveyances and mandates, seeking to affirm, confirm or ratify, the said void judgment, Final Decree of Foreclosure are no better than their beginning, which is a nullity, a nothing and like the multiplication of nothing, remains nothing, null; ineffectual; nugatory; having no legal force or binding effect; unable to support the purpose for which it was intended, and as stated in 15 R.C.L., page 316:

> "If a judgment is void, no subsequent proceedings can cure the evil. Void judgments cannot be validated by citing the parties against whom they are rendered to show cause, why it should not be declared valid, nor can such a judgment be ratified by the legislature, for a void proceeding is so entirely vitiated as to be irreparable of amendment or cure. * * * No rights are in any way affected by it, and from it no right can be derived and all proceedings founded thereon are invalid." (R. 115 and 125-130).

It is settled law, that the United States District Court by virtue of its general equity jurisdiction can enjoin a party from enforcement of a void judgment, is clearly stated in *Johnson* v. *First National Bank*, 223 F.2d 31, citing *Simon* v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L.Ed. 492, where the United States Supreme Court, said:

"But this is sufficient to show that if in a proper case, the plaintiff holding a valid state judgment can be enjoined, by the United States Court from its inequitable use, by so much the more can the Federal courts enjoin from using that which purports to be a judgment, but, is in fact, an absolute nullity." *Marshall* v. *Holmes*, 141 U.S. 597, 35 L. Ed. 873, 12 S. Ct. Rep. 62; *Games* v. *Fluentes*, 92 U.S. 10, 23 L. Ed. 524; *Barrow* v. *Huston*, 99 U.S. 85, 25 L. Ed. 408.

"Such judgments are not erroneous and not voidable, but, upon principles of natural justice, and under the due process clause of the 14th Amendment are absolutely void."

Courts have repeatedly held that Equitable relief can be granted to annul a judgment on extrinsic fraud in obtaining a wrong judgment in a state court, and that Federal equity jurisdiction acts, not on judgment assailed, but rather on successful parties to deprive them of the fruits of their fraudulent acts, by enjoining the enforcement of such void judgment, as follows:

"Equitable relief to annul a judgment can be granted on fraud extrinsic to matters tried and determined by the other court, and which caused court to render a wrong judgment, such as successful party through fraud or deception preventing the unsuccessful party from presenting his case, or from attending the trial, or where his attorney was induced to betray his client's interest, or other chicanery of that kind."

"Even in presence of extrinsic fraud federal equity jurisdiction in suit to annul judgment does not act on judgment assailed, but acts rather on successful parties to deprive them of the fruits of their fraudulent acts, which operated to procure the judgment." *Johnson* v. *First National Bank, Wichita, Kans.*, 223 F.2d 31.

The void judgment, complained of herein was obtained solely by the unauthorized stipulation and fraud practiced upon the Court, by a false allegation of jurisdictional facts, which prevented this Plaintiff-Petitioner from being allowed to offer her defense thereto, or appear and be heard.

Complaint alleges carefully that Petitioner's Constitutional Rights have been violated, and that the First, Fifth and Fourteenth Amendments are involved herein, "Taking of Property Without Due Process of Law" and the "Denial of Equal Protection under the Laws of the Land"; and in such a case the Courts have held that the Federal Courts have proper jurisdiction, and this is made clear in the following, from *Bell* v. *Hood*, 327 U.S. 678, 90 L. Ed. 939, 66 S. Ct. 773:

> "Whether the action arises under the Constitution, a statute or treaty of the United States is determined by the face of the complaint, for to that extent the plaintiff is the master to decide what law he will rely upon and the plaintiff determines whether his action arises under the Constitution, a statute or treaty of the United States. Jud. Code 24 (1), 28 U.S.C.A. 41 (1)."
>
> "Where federally protected rights have been invaded courts will be alert to adjust their remedies so as to grant the necessary relief."
>
> "Before deciding that there is no jurisdiction, because the action does not involve a 'controversy arising under Constitution or laws of the United States' the Court must look to the way the complaint is drawn to see if it claims a right to recover under the Constitution and laws of the United States, * * *."
>
> "Where legal rights have been invaded, and federal statute provides for a general right to sue for such invasions, federal courts may use any available remedy to make good the wrong done."

> "Where the alleged violations of the Fourth and Fifth Amendments by defendants formed the sole basis of relief sought, and if the allegations had any foundation in truth, plaintiff's legal right had been violated, the court could not dismiss the action for want of jurisdiction on ground that the cause of action was patently without merit. Jud. Code 24 (1), 28 U.S.C.A. 41; U.S.C.A. Const. Amends. 4, 5."
>
> "It is established practice for the Supreme Court to sustain the jurisdiction of Federal Courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the Fourteenth Amendment forbids the state to do. U.S.C.A., Const. Amend. 14."

There are many cases where federal courts have enjoined *litigants* from enforcing judgments fraudulently obtained in the state courts, and two of these are set forth to show that Petitioner has stated a cause of action upon which relief can be granted, and that the District Court had proper jurisdiction to hear the same.

Wells Fargo & Co. v. *Taylor*, 41 S. Ct. 93, is such a case, and says:

> "The United States Court can enjoin the enforcement of a judgment rendered by a state court on a showing that judgment was obtained by fraud or that for some other reason it was inequitable to enforce it, since that is an independent suit, not affected by judicial Code 265 (Comp. St. 1242) prohibiting the United States courts from granting injunction to stay proceedings in state court."

and to the same effect, *Simon* v. *Southern Railway Co.*, 35 S. Ct. 255, which makes it clear that Federal Court can enjoin the enforcement of a judgment of a state court, obtained by fraud:

"A Federal Circuit Court had jurisdiction—to enjoin the enforcement of a judgment of a state court, obtained by fraud, and without notice to the judgment debtor—especially where, under the local law, the judgment debtor was not obliged to attack a void judgment in the court that rendered it but might institute a new and independent proceeding in a court having jurisdiction of his person to enjoin the judgment creditor from enforcing it."

In addition to the foregoing, where Congress had conferred jurisdiction, in such a case as this, it will be remembered that this Petitioner, *was* denied "due process of law" and there *was* a purposeful conspiracy, to impede and prevent and obstruct and defeat due course of justice, and to deprive Petitioner of her right to present her meritorious defense, and the United States District Courts' Jurisdiction in the instant case has been made abundantly clear by the New Federal Code, Sections 1331 and 1343, of Title 28, of the United States Code Annotated, as Amended by Civil Rights Act, of September 9, 1957; and by the recent case of *Hoffman* v. *Halden*, 288 F.2d 280, which says:

"An action based on statute providing that every person who under color of any statute, ordinance, etc., of any state or territory subjects any citizen of the United States or other person within jurisdiction thereof to deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to injured party, and is not limited to due process, but extends also to denial of equal protection. U.S.C.A. Const. Amend. 14; 42 U.S.C.A. 1983."

"Test of sufficiency of complaint under the Civil Rights Statute is whether in addition to general allegation of conspiracy, purpose, intent and color of authority it sets forth with certainty facts showing particularly what a defendant or defendants did to carry conspiracy into effect, whether such acts fit

within framework of conspiracy alleged and whether such acts, in ordinary course of events, would proximately cause injury to Plaintiff. 42 U.S.C.A. 1981 et seq. 1983, 1985 (2-3)."

"Under statute concerning conspiracy to impede justice with intent to deny a citizen equal protection of law, elements of cause of action for violation of such statute are that defendant conspired, that purpose of conspiracy was to impede or hinder, or obstruct or defeat due course of justice in state or territory with purposeful intent to deny a citizen equal protection of the law and that acts complained of were done under color of state law or authority and that plaintiff was injured in his person or property or was deprived of having or exercising a right or privilege of a citizen of the United States by the act done in furtherance of the conspiracy. 42 U.S.C.A. 1985 (2)."

Analysis and consideration of the conclusion in the Opinion of the United States Court of Appeals, 5th Circuit, appears indicated.

Reported in the Advance Sheet, November 5, 1962, the head note in *Warriner* v. *Fink*, 307 F.2d 933, the instant case hereiñ, is as follows:

"When mortgagor failed to seek review by the United States Supreme Court of Judgment of Florida Supreme Court dismissing her appeal without consideration of merits of mortgage foreclosure suit, she lost only avenue of relief available to her in federal courts, and therefore federal District Court had no jurisdiction to enjoin enforcement of, or to set aside or hold void the foreclosure decree entered by Florida trial court. 28 U.S.C.A. 2283; F.S.A. 687.07."

Such an interpretation, is clearly—grossly—wrong. The law of the United States as settled by this Court clearly prohibits this interpretation.

The Order, dismissing Appeal, dated January 23, 1952, and referred to in the said Opinion, was rendered without briefs, without hearing or consideration of the merits, and without opinion, and says:

> "Upon consideration of the motion of counsel for Appellee to dismiss the appeal in this cause, it is ordered that said motion be and the same is hereby granted and the appeal which was entered in this cause in the Circuit Court of Monroe County, Florida, on November 10th, 1951, be and the same is hereby dismissed."

This Court simply refused to take jurisdiction.

At that time the foreclosure suit had not been concluded, and there was no reason to doubt the competence of the State Court, or to assume that it would be derelict in its duty to protect, and to uphold Petitioner's Rights; and *there were* alternative State Court Remedies available; which were properly pursued, by way of the "Original Bill in the Nature of a Bill of Review", filed at once without delay, February 12, 1952, as previously stated aforesaid.

That there was good reason for this is shown by the reaction of the Circuit Court of Monroe County in its refusal to dismiss the said suit, until required to do so by the Supreme Court of Florida, granting Certiorari, and terming the matter in controversy, "res adjudicata", but had that been the case, then the appeal should have been heard; and even in that ruling there was a minority opinion by Justice Sebring, which did not agree with the conclusion that the matter was "res judicata".

That Petitioner was justified in her belief in the presumption that the State Courts would not be derelict in their duty, is borne out by the authorities and precedents

pertinent, and laws applicable and controlling, throughout the country, where this has been the case (R. 188 and R. 103-118). Where others were accorded different treatment, on the same points of law, among them being the parallel case of *Scott* v. *Dilks*, 117 P.2d 700, where therein also, because of the "unauthorized stipulation" induced by the fraudulent representations of the Defendants, there was no judicial examination of the facts prior to judgment. The issues were as effectively withdrawn from any judicial consideration as if they had never been submitted to the Court, which held:

> "Where jurisdiction of Court has been imposed upon and prevailing party by some extrinsic fraud has prevented a fair submission of the controversy, equity will relieve injured party from effect of judgment."
>
> "In case of direct attack on judgment on ground that judgment was procured by fraud, doctrine of 'res judicata is not applicable.' "
>
> "The submission of stipulation for judgment to Court for signing of formal judgment did not put it beyond power of court of equity to set aside judgment in subsequent action directly attacking former judgment on ground of extrinsic fraud."
>
> "Because of the stipulation induced by the fraudulent representations of the defendant there was no judicial examination of the facts prior to judgment in the former case in 1929. The issues were as effectively withdrawn from any judicial consideration as if they had never been submitted to the Court. 13 L.R.A. N.S. 579." (R. 199).

That the Florida Supreme Court has held to the same effect in prior decisions (R. 130-132), that "Unauthorized Stipulations" by attorneys, as "nugatory and ineffectual"

except in this matter, where this Petitioner "was accorded different treatment"; as shown in the following:

> "The answer to the contention, as shown by the record, is that these appellants had no knowledge of the existence of the stipulation until after the entry of the final decree, they were not consulted or informed of the contents or the far reaching effect thereof until after the entry of the final decree; after being so informed the appellants repudiated the agreement, employed other counsel and brought the case here. The usual terms of employment of an attorney by a client to represent him in a litigated cause do not authorize the attorney to stipulate for the entry of a final decree, as was done at the case at bar. See *State ex rel. Personal Finance Co.* v. *Lewis*, 140 Florida 86, 191 So. 295 and *Swift and Co.* v. *Hocking Valley Ry. Co.*, 243 U.S. 281, 37 S. Ct. 287, 61 L. Ed. 722, *Supra*."

Another example of denial of equal protection of the laws of the land, and in which others were accorded different treatment on the same points of law, particularly where due process of law is also involved, and the right to appear and be heard is shown to be a fundamental right, is the Florida Case of *Mayflower* v. *Brill*, 188 So. 205 (R. 136-137), citing *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914; *Hovey* v. *Elliott*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215; *Glazier* v. *Rusoff*, 129 Conn. 120, 179 Atl. 407; and *Hunter* v. *May*, 161 Tenn. 155, 25 S.W.2d 580, which held:

> "A sentence of the court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

> "The question for determination is, whether the decree of condemnation thus rendered, without al-

lowing the owner of the property to appear in response to the monition, interpose his claim for the property, and answer the libel, was of any validity. In other words the question is, whether the property of the plaintiff could be forfeited by the sentence of the court in a judicial proceeding to which he was not allowed to appear and make answer to the charges against him, upon the allegation of which the forfeiture was demanded."

"The position of the defendant's counsel is, that, as the proceeding for the confiscation of the property was one in rem, the court, by seizure of the property acquired jurisdiction to determine its liability to forfeiture and, consequently, had a right to decide all questions subsequently arising in the progress of the cause; and its decrees, however erroneous, cannot therefore, be collaterally assailed * * *.

"* * * 'A proceeding' continued the court, 'professing to determine the right of property, where no notice, written or constructive, is given, whatever it might be called, would not be dignified with the name of a judicial proceeding. It would be a mere arbitrary edict, not to be regarded anywhere as the judgment of the court.' "

"The doctrine invoked by counsel that where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition; but, like all general propositions, is subject to many qualifications in its application * * *.

"* * * Though the Court may possess jurisdiction of a cause, of the subject-matter and of the parties, it is still limited in its modes of procedure, and the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law * * *.

"The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgments, the law which is applicable to it * * *.

"It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the right of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore, could be no exercise of jurisdiction * * *." *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914, Text 915, 916, 917 and 918 (R. 115, 116, 124-130).

That a void judgment is subject to both collateral and direct attack, and "*is not res judicata of anything*" and that this is positively stated in authorities throughout the country, was brought to the attention of the court, and upon which others had been accorded different treatment, on the same points of law, as shown by, *Brown* v. *Brown*, 261 S.W.2d 492; *Zenker* v. *Zenker*, 72 N.W.2d 423; *Peterson* v. *Peterson*, 288 F.2d 171; *Anthony* v. *Kasey*, 83 Va. 338, 5 S.E. 176; A.L.R. 277; and Freeman on Judgments 117 (R. 115, 128); and in *Brown* v. *Brown*, we find:

"Courts derive their power to adjudicate from the law, not the parties, and a court acting without jurisdiction of subject matter or beyond the jurisdiction conferred upon it is therefore acting without authority of law, and its judgments and decrees are void."

and in *Zenker* v. *Zenker*:

> "Judgment which is rendered by Court that did not have jurisdiction of the subject matter or of the person is not res judicata of any issue purported to have been raised therein and is subject to collateral attack. Void decree is void for all purposes and may be collaterally attacked and is not res judicata of anything."

and in *Peterson* v. *Peterson*:

> "A Court of general jurisdiction has inherent power to set aside judgment obtained through fraud practiced upon the Court."

> "It is not a question, as defendant claims it is, of new evidence to be used to relitigate an already litigated issue, but a question of whether on the litigation of that issue the Court was imposed upon by the fraud of the prevailing party."

That the only argument ever offered by Respondents, that "the complaint fails to state a cause of action", is and has been, that the matters are "*res judicata*", by virtue of the so-called appeal, dismissed without hearing or briefs, in the original foreclosure; and has also since prevented Petitioner from having the cause heard on the "*merits*", as herein, being the Order of January 23, 1952, by which the United States Courts, both for the Southern District of Florida and the United States Court of Appeals, for the 5th Circuit, construed that Petitioner had lost her *rights* and the *protection* of the United States Constitution.

This interpretation is foreign to our American way of life, our Constitution is *supreme*, our Rights are *guaranteed*. These fictitious and irrelevant proceedings are not sufficient to deprive Petitioner of these valued and cherished rights as a citizen of the United States; and that

has been the consensus of the Opinions of the Supreme Court of the United States for generations.

That the United States Courts are the guardians of the Constitution, is apparent from the decision in *Howard et al.* v. *Ladner*, 116 F. Supp. 783, and citing *Angel* v. *Burlington*, 330 U.S. 183, 205, footnote 11, 67 S. Ct. 657, 668, 90 L. Ed. 852:

> "* * * and much of that case law has been that if the ' "merits" in the sense of the ultimate substantive issues of a litigation' are not reached their later determination is not foreclosed."
>
> "The United States Courts are peculiar guardians of the Constitution of the United States. The decisions of even the highest state courts are not binding upon federal courts concerning questions arising under the the Constitution of the United States. If we were concerned simply, with an application of the doctrine of stare decisis, it would be clear that we are not bound by the opinion of the Supreme Court of Mississippi when all that is involved is the decision of a pure question of law, it seems doubtful whether a different result should follow because we call the doctrine res judicata rather than stare decisis."
>
> "* * * we prefer, however, to base our decision upon considerations of public policy to which the doctrine of res judicata should yield. As was stated by Judge Hutcheson in *Homes* v. *Donald*, 5 Cir., 84 F.2d 188, 190, 'It (res judicata) is not a Procrustean formula to be rigorously and rigidly applied, to give substance to what was merely an appearance of finality, and thus cut off actions and defenses not really, but only apparently determined', Mr. Justice Rutledge in his dissenting opinion in *Angel* v. *Burlington, supra*, 330 U.S. at page 203, 67 S. Ct. at page 668, made, it seems to us, a sound observation, not in conflict with the opinion of the Court in that case, to

> the effect that it is not every case 'in which the policy of stopping litigation outweighs that of showing the truth.' "

from, *Angel* v. *Burlington*, we also find:

> "Where resort was had to a federal court not on grounds of diversity of citizenship, but because a federal right was claimed, the limitations upon courts of a state did not control a federal court sitting in the state."
>
> "A state cannot escape its constitutional obligations by the simple device of denying jurisdiction of cases to courts otherwise competent. U.S.C.A., Const., Art. 1, 10; Art. 4 (1) (2)."
>
> "The result of the decision was to leave the cause of action unaffected because when a state denies a remedy, it leaves unimpaired the plaintiff's substantial right, so that he is free to enforce it elsewhere. (Citing) *Bradford Electric Light Co,* v. *Clapper*, 286 U.S. 145, 160, 52 S. Ct. 571, 576, 76 L. Ed. 1026, 82 A.L.R. 696; *Dalton* v. *Webster*, 82 N. C. 279."

That the Federal Courts, herein, were made aware, and presented the *facts, undisputed,* that the Void Judgment, complained of herein, was obtained by fraud; and the corrupt conspiracy and evil intent, purpose and chicanery by Respondents to deprive Petitioner of her property, without due process of law, is shown in the record (R. 185-187), in part, in these words:

> "Mrs. Warriner: But that is not the case, in my opinion. And I have researched it, and I do have many cases on the matter. As to jurisdiction, it involves a Federal question. It involves not one Federal question, but two Federal questions. It involves the Federal question of due process of law. It involves the question of deprivation of property without due process of law. It involves the question of equal protection under the laws.

"Now, Mr. King is correct in that the matter was begun, but not by me, in the Court of Monroe County where I was a defendant. And I, using reasonable diligence, not knowing anything at all about the law, employed a member of the Florida Bar to represent me and to protect my rights. Unbeknown to me, after an answer to that case had been filed by the attorney—and I knew that the answer was filed of record, because I drove to Key West, myself, and filed it—and felt that I was being protected, the attorney had prepared it—unbeknown to me my attorney was tricked into entering into a stipulation by the attorney then representing the alleged plaintiff in that case, a Harry Fink, who was not the real party in interest at all. The real party in interest was Sam Kay. But Fink had brought the suit.

"I filed an answer denying the debt, denying all the material allegations of the complaint. Then three days before Christmas, on the 22nd of December, the attorney that I had employed, B. R. Cisco, and Harold Kassewitz entered into a stipulation, which the intention of it was to deprive me of my rights to the property, without my knowledge or consent. I was not informed of any final decree which was entered on the 29th day of December, at the same time that this stipulation was filed. They were filed simultaneously on Friday afternoon before New Year's, which gave me three days to redeem the property—without any notice whatsoever to me, without being advised of it. I had no knowledge whatever until after they had held a sale, which was sometime in February, when Mr. Harold Kassewitz boasted that they had bought my property.

"I immediately went down and secured the services of another attorney, who was a respected man in the community, and is still a respected man in the community—Leland Hyzer We had the notice on the 2nd of March. On the 4th of March he filed a motion to vacate. Now, the motion to vacate was properly filed,

it was timely filed. It was filed as soon as we had notice of this outrageous thing that had happened.

"Mr. Cisco was fired. Subsequent to that, I learned that Mr. Cisco was an alcoholic—at that time. I don't believe he is now. But I understand that he was at that time. I didn't know that."

The cunning and intent, the carefully concocted conspiracy, and the fraud perpetrated upon the Petitioner herein, are apparent; the securing of the Stipulation, from an alcoholic, at Christmas time, when most humans are concerned with Happy things, Religion and the Giving of gifts; the carefully prepared Final Decree of Foreclosure, by Harold Kassewitz, providing for three days for this Petitioner to Redeem her property, and the timed filing of the Stipulation and Final Decree of Foreclosure, Friday, December 29th simultaneously; all show conclusively the deliberate, willful, wanton, wicked, fraud and deceit to deprive the Petitioner, of her property without due process of law, and the equal protection of the laws, in obtaining the said void judgment.

In *Moffeit et al.* v. *Robbins*, 81 F.2d 431, the Court held:

"United States Court may restrain enforcement of judgment fraudulently obtained in state court if requisite elements of federal and equitable jurisdiction exists but, in so doing, court does not review irregularities in proceedings, but considers conduct of successful party and injunction acts upon party and does not affect judgment.

"It is well settled that a final judgment rendered by court having jurisdiction of the subject matter and the parties is conclusive upon the parties and those in privity with them in a subsequent action upon the same cause of action as to all matters in fact actually litigated or which might have been litigated there-

in; and such a judgment operates as an estoppel between the same parties in a subsequent proceeding upon a different cause of action only with respect to the matters actually litigated and adjudicated. That ancient rule applies even though the judgment may have been erroneous in fact or law, or both * * *.

"It may however, restrain a successful litigant from enjoying the fruits of a judgment fraudulently obtained in state court if the requisite elements of a federal and equitable jurisdiction exists. In so doing the Court does not act in review of the judgment, nor is it concerned with irregularities occurring in the proceeding in State Court. It considers the conduct of the successful party there and if it is found that he committed fraud in securing the judgment, he is prevented from enjoying its benefits. The restraint acts upon the party and does not affect the judgment, *Simon* v. *Southern Railway Co.*, 35 S. Ct. 255."

and in the case of *Johnson* v. *First National Bank, Wichita, Kansas*, to the same effect, with excerpts from the same case:

"Appeal to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Louisiana, enjoining the enforcement by a judgment creditor of a judgment of a state court, obtained without notice to the judgment debtor, affirmed. This Appeal raises a question of the power of a United States Court to enjoin the appellant, Ephrahn Simon, from enforcing a judgment, alleged to have been fraudulently obtained by him in State Court, in a suit against Southern Railroad.

"It serves to illustrate the existence of appellees' right and the method of its enforcement to note that under the law of Louisiana the railway company was not obliged to attack a void judgment in the court that rendered it, but, in a court having jurisdiction of the

plaintiff's person, could have instituted a new and independent proceeding to enjoin Simon from enforcing it.

"Manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a Federal Court, which was then bound to act within its jurisdiction and afford redress. * * * The United States Court could not stay original or supplemental proceedings in state court, * * * or revise its judgments. But by virtue of their general equity jurisdiction, they could enjoin a party from enforcing a void judgment.

"That while Sec. 720 prohibits United States Court from 'Staying proceedings in a state court' it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal Courts from enjoining a party from using that which he calls a judgment, but which is in fact and in law, a mere nullity. That conclusion is inevitable, or else the Federal Court must hold that a judgment void for want of service—is 'a proceeding in a state court' even after the pretended litigation has ended and the said void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes."

That the principal case upon which Respondents relied to support their contention that the District Court was without Jurisdiction, was *Toucey* v. *New York Life Insurance Co.*, 62 S. Ct. 139, and cited as authority in *Sexton* v. *Barry*, 233 F.2d 220, and that this case is no longer effective was made abundantly clear under the New Federal Judicial Code, Title 28, Section 2283 (2 and 3), of the United States Code Annotated, as aforesaid:

"Excepting clause of present section 'restores' the basic law as generally understood and interpreted prior to the Toucey decision."

Respondents and Federal Courts alike, have *ignored* the scope of the prohibition, its limitations and exceptions, 3.1, 3.2, 3.3 and 3.4, and the cases in effect and controlling.

That this should be the case, in the face of the clear understanding, evidenced by the United States Court of Appeals, 5th Circuit, in the body of its Opinion, as to the fraud, deception, and chicanery of the Respondents and their then Attorney in the procurement of the void judgment, herein under attack; and also that this Court was fully aware that the Circuit Court of Monroe County had proceeded without due process of law, and without jurisdiction, makes it all the more amazing and astounding.

Such an interpretation by the intelligent and knowledgeable United States Court of Appeals, 5th Circuit, suggests an ulterior motive of purpose and intention that there be a firm determination of this matter by the highest Court in the land; as the litany of cases in the conclusion of the Opinion are exactly the opposite of the instant case—being within the prohibition of Title 28, Section 2283, U.S.C.A., whereas, the instant case belongs to that group of cases said to constitute an "*exception*".

An examination and analysis of the cases cited in the said Opinion, reveals that conversely they point out this fact.

The cases cited, were regularly tried, the issues determined and adjudicated, by Court or Jury, or administrative Board, testimony was taken and evidence presented; the Court having acquired jurisdiction of the subject matter and the person, proceeded with jurisdiction—and there was no question of fraud or chicanery, and an

injunction *was* sought to stay proceedings pending in State Court; *whereas in the instant case the opposite is true, as aforesaid.*

In *Rooker* v. *Fidelity Trust Co.*, 1923, 263 U.S. 413:

> "* * * the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, * * *"

In *Sexton* v. *Barry*, 6 Cir., 1956, 233 F.2d 220:

> "* * * appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio * * *."

In *Manufacturer's Record Publishing Co.* v. *Lauer*, 5 Cir. 1959, 268 F.2d 187, Petitioner has changed the emphasis to accentuate the positive, that in the instant case, relief should be granted, as shown in the excerpt, as follows:

> "*A federal court sitting in equity has jurisdiction to disregard or to enjoin the enforcement of an unconscionable judgment of a state or of a national court for new causes, such as fraud, accident or mistake, which deceive the court into a wrong decree, or which prevent the judgment defendant from availing himself of a meritorious defense that was not fairly presented to the court which rendered the judgment.* But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree. *The reason of this rule is that cases of the former class present new controversies, which have never been raised in other courts,* while cases of the latter class invoke a jurisdiction which does not exist, a jurisdiction in a federal court to review and revise the acts and decisions of courts of co-ordi-

nate jurisdiction upon questions which they have lawfully considered and adjudged."

"* * * where collateral attacks succeeded, the precise, the definite, basis of their success was that the court whose judgment was under collateral attack had not proceeded with jurisdiction. * * *"

"* * * *In others, though it had acquired jurisdiction, it had thereafter, and without the actual knowledge of the complaining person proceeded in such manner as to deny him due process, that is, a fair and reasonable opportunity to be heard.*"

"In short, in some of these situations, the court had not, in respect of the matter complained of, acquired jurisdiction. *In others, it had proceeded beyond the jurisdiction theretofore acquired.*"

Consideration of another case in the Court's Opinion, *T. Smith & Son, Inc.*, v. *Williams*, 275 F.2d 397, shows Title 28, Section 2283, to be essentially a rule of comity, and recognizes and concedes an implied exception for relitigation cases, although, uncertain, as follows:

"* * * and federal courts began to create judicial exceptions. These exceptions reshaped the rule into a flexible but uncertain guide for avoiding friction between federal and state courts.

"Properly considered Sec. 2283, as a whole 'does not go to the jurisdiction of a federal court,' but is an affirmation of the rules of comity, and hence it should be read in conjunction with the judicial principles developed for our dual system of courts. Moore's Commentary on the Judicial Code, 1949."

In Moore's Commentary on the U. S. Judicial Code, Stay of Court Proceedings, we find:

"Prior to *Toucey* it had been well settled that, notwithstanding former 379, federal courts could en-

join litigants from enforcing void judgments or those fraudulently obtained in the State Courts. Considerable doubt was cast upon these cases by *Toucey*. Nevertheless, under present 2283 their doctrine is valid. An old and established jurisdiction of equity was its power to entertain an action to enjoin a holder of a judgment from reaping its benefits in situations where it was inequitable for him to do so. The federal courts, as courts of equity, succeeded to this jurisdiction, have long exercised it, and the issuance of an injunction is necessary to effectuate it." (Citing cases, already cited herein.)

"Briefly, the federal courts should respect and refrain from improper interference with state court proceedings. Correlatively they have the right and duty to maintain and effectuate their jurisdiction; and when the circumstances warrant, the federal court, as a court of equity, should mould its process to accord with the factual situation. At times this will warrant an injunction against state court proceedings. The principles of comity and present 2283 so recognize."

That the Courts are divided, uncertain, confused and unclear, in this sensitive and delicate area of *"Comity"* and Title 28, Section 2283, and its effect, is evidenced in the recent case of *Amalgamated Clothing Workers* v. *Richman Brothers*, 75 S. Ct. 452, where this Court was divided, and said of the *exceptions*:

"We turn therefore, to the specific exceptions in 2283. The first of these permits an injunction to issue 'as expressly authorized by Act of Congress'. In the present case we are directed to no 'express' authorization within even the most attenuated meaning of the term. Of course no prescribed formula is required; an authorization need not expressly refer to 2283."

"But the argument is made that to permit the state courts to proceed unchecked in their incursion upon a federally pre-empted domain dislocates the fed-

eral scheme as a whole. This argument is only a rephrasing of the suggestion that whenever Congress is found to have pre-empted a field by legislation 2283 must yield."

"* * * The Revisers expressly approving the Toucey dissent, stated that 'the revised section restores the basic law as generally understood and interpreted prior to the Toucey decision.' Changes were made in phraseology. By enacting 2283, Congress thus rejected the Toucey decision and its philosophy of judicial inflexibility. However imprecise may be the language of 2283 its legislative history makes abundantly clear that the provision was not intended to repeal pre-existing exceptions to 265. To read 2283 literally—as the majority opinion does—ignores not only this legislative history but also over a century of judicial history."

The above interpretation expressed in the Minority Opinion, is not in conflict with a case of long standing, and presently in effect and controlling, of *Lehman* v. *Graham*, Florida 1905, 135 Fed. 39, 67 C.C.A. 513, as to exceptions.

This is a case where "one of the purposes of the bill is to remove 'an apparent lien and cloud' upon lands owned by the Complainant," and wherein the Court held, as follows:

"* * * The literal application of this statute would have forbidden the issuance of the injunction in this case. But the statute does not, and could not, have literal application. It must be construed so as to harmonize with other statutes and with the Constitution. Sections 716, 718 and 719 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 580, 581) authorize the United States Courts and Judges to issue the writ of injunction. The Constitution confers on the federal courts jurisdiction in all cases in law and in equity arising under the Constitution."

> "* * * If the federal court has jurisdiction of the case by reason of the citizenship or alienage of the parties, or otherwise, it can grant relief against a judgment of a state court obtained by fraud (or other equitable grounds) in any case in which relief could be granted if the judgment were rendered by a United States Court; and in such case a preliminary injunction may be issued against the defendants to prevent the collection of the judgment by execution or otherwise."

A recent case that also comes under the New Federal Judicial Code, Title 28, Section 2283, of the United States Code Annotated, is *Crossman* v. *Fontainbleau Hotel Corp.*, 278 F.2d 720, originating in the *same* United States District Court here, in which the *same* United States Court of Appeals, Fifth Circuit, herein, reversed the decision, and recognized the Second of the specific exceptions provided in the said statute, which held:

> "A federal court may issue an injunction staying proceedings in a state court when necessary in aid of its jurisdiction, or to protect or effectuate its judgments. U.S.C.A. 2283, *Jacksonville Blow Pipe Co.* v. *Reconstruction Corp.*, 1957, 244 F.2d 394; *Southern California Petroleum Corp.* v. *Harper*, 5 Cir. 1960, 273 F.2d 715; See also Rule 62 (g), F. R. Civ. P., 28 U.S.C.A."

> "The District Court's Order dismissing the Complaint is Reversed and the case is remanded for further proceedings not inconsistent with this opinion."

Judge Hutcheson concurring specially, said:

> "* * * It is to say only that an appeal to equity of the nature of that asserted here should ordinarily be disposed of on the facts rather than on the pleadings. Cf. *Black* v. *First National Bank*, 5 Cir., 255 F.2d 373."

Another case which clearly recognizes the "exceptions", and is pertinent to Petitioner's claim for relief, *conversely*, is *Greyhound Corp.* v. *Leadman*, 112 F. Supp. 237. which held:

> "* * * the prohibition applies whatever the nature of the proceeding, *unless the case presents facts which bring it within one of the* * * * *exceptions.*"
>
> "Accordingly, the question in this case is whether the facts and circumstances presented show that the injunction sought by plaintiff is necessary in aid of the established equity jurisdiction of the court to prevent enforcement of a judgment which 'will be contrary to recognized principles of equity and the standards of good conscience. *Wells Fargo and Co.* v. *Taylor, supra.*" * * *

In the above case, the Court gives its "Conclusions of Law", in Note 6, "The facts and circumstances disclosed by the evidence impel the following conclusion", which Petitioner presents herein, set forth *conversely*, to apply to the instant case, as follows:

1. The judgment of the State Court sought to be enjoined herein *was procured by denial and impairment of Petitioner's Constitutional rights, and it is otherwise rendered null and void.*

2. Enforcement of the judgment in question *would be unconscionable and contrary to recognized principles of equity.*

3. The evidence *is sufficient to bring Petitioner's claim within the exceptions to the prohibitory provisions* of 28 U.S.C.A. 2283, and hence, the power of the Court to grant the injunctive relief sought by Petitioner is *not* precluded.

The "exceptions" to 2283, recognized to provide for an injunction to restrain enforcement of a judgment fraudu-

lently obtained in state court, without due process of law, have previously been presented herein, but there is another type of case, involving "*fraud*" and "*due process of law*" where this statute is not involved, that appears pertinent; one of these is *O'Boyle et al.* v. *B. Bevil*, 259 F.2d 506, Certiorari denied 79 S. Ct. 590, 350 U.S. 913, 3 L. Ed. 575; citing *Griffin* v. *Griffin*, 1946, 327 U.S. 220, 66 S. Ct. 556, 90 L. Ed. 635, and *Bass* v. *Hoagland*, 5 Cir. 1949, 172 F.2d 205, in which is cited, *Windsor* v. *McVeigh*, 93 U.S. 274, 23 L. Ed. 914, also previously cited herein; excerpts from the *O'Boyle et al.* v. *B. Bevil* case, are as follows:

> "Proceedings in equity (1) to remove as an alleged cloud upon plaintiff's title two Texas state court judgments, and (2) to enjoin enforcement of those judgments by defendants. * * *"

Citing from *Bass* v. *Hoagland*:

> "The answer says there was no evidence heard at all, and this is admitted for the present, and an admitted fact may be used on collateral attack as well as the record itself.
>
> "* * * Bass, living in Texas did not know that the case had been called for trial till he was served with the present suit. This does not look like due process of law under the Constitution, nor even like a trial. * * *
>
> "Strong ground has been taken by the Supreme Court and in strong language, against treating cases as in default which were not so. * * * The fundamental conception of a court of justice is condemnation only after hearing. To say that Courts have an inherent power to deny all right to defend an action and to render decrees without any hearing whatever is in the very nature of things to convert the court exercising such authority into an instrument of wrong and oppression and hence to strip it of the attribute of

justice upon which the exercise of judicial power necessarily depends. * * *

"It was held that the court of the District of Columbia had no right to strike the answer and treat the case as in default and give judgment without evidence and that the decree was on collateral attack void." * * *

"When Bass by his attorney filed a denial of the plaintiff's case, neither the clerk nor the judge could enter a default against him. The burden of proof was put on the plaintiff in any trial. When neither Bass nor his attorney appeared at the trial, no default was generated; the case was not confessed. The plaintiff might proceed, but he would have to *prove* his case. * * * Bass under the admitted facts knew he was not in default, did not know his counsel had withdrawn, and had no notice that a judgment by default was to be asked. To get such a judgment without evidence and without notice is not in our opinion due process of law."

Citing from *Griffin* v. *Griffin*:

"A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction * * * moreover, due process requires that no other jurisdiction shall give effect, even as a matter of *comity* to a judgment elsewhere acquired without due process." * * *

"A judgment obtained by fraud is a nullity. To establish the fraud as well as the want of jurisdiction to render the judgment for failure to observe the requirements of the state statutes, the court in which the judgment is brought in question may consider the entire record in the case, pleadings, process and evidence and may, in proper cases, consider extrinsic evidence."

Continuing from *O'Boyle et al.* v. *B. Bevil*:

> "The fraud asserted is that the defendants, in presenting their case to the state court, withheld knowledge of the conveyance from Bevil to Texas Little Farms Co., and the plaintiff here." * * *
>
> "* * * We decide only that their allegations and proof entitle them to ask a court to look into their claim that the judgments were void."

From Judge Cameron's opinion:

> "In concurring with the able and articulate opinion of the majority written by Judge Tutle, I feel constrained to set down a few remarks about jurisdiction. To my mind, the fundamental error of the court below is contained in its fourth conclusion of law reading thus:
>
> "This suit constitutes a collateral attack on the two State Court final judgments (sic) since each of such judgments is valid on its face such judgments import absolute verity and cannot be set aside or vacated in this proceeding."
>
> "That statement is expressive of views held by a great many people arising doubtless from the fact that it is not difficult to become so enamored of the shibboleths and nomenclature of the judicial process as to lose sight of its realities and basic functions."
>
> "But I do not conceive that the Judiciary is invested with any such absolute power or that its edicts can be considered as possessed of such infallibility. On the other hand, it is my conviction that any court of competent jurisdiction, either state or federal, can adjudge the merits of any suit involving the validity of a final judgment of any other court, state or federal, where the basis for attack is that the court rendering the questioned judgment did not have jurisdiction to render it, or that such judgment was procured by fraud. These are the grounds of the attack against the two state court judgments here."

"This Court is in my opinion, committed to this principle, *Bass* v. *Hoagland*, 5 Cir., 1949, 172 F.2d 205."

In view of the fact that in the instant case, complaint clearly shows a deprivation of constitutional rights, and a purposeful conspiracy by Respondents to deny Petitioner equal protection under the law, and due process of law, the interpretation and application, by the Court of the case of *Hanna* v. *Home Insurance Company*, 5 Cir. 1960, 281 F.2d 298, is bewildering, for in that case, this Court held:

"Unless state court's errors constitute a deprivation of constitutional rights, such errors may be reviewed in federal court system only by the United States Supreme Court."

"To establish action in federal District Court for conspiracy to deprive plaintiff of equal protection of the law, plaintiff must show a purposeful conspiracy to deny him due protection * * *"

"* * * there must be an actual denial of due process before a cause of action arises. 42 U.S.C.A. 1983."

Under the New Federal Judicial Code, District Courts; Jurisdiction: Section 1343 of Title 28 of the United States Code Annotated, provides for original jurisdiction in the Federal District Courts, as follows:

"Civil rights and elective franchises. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right of (or) privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in Section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs men-

tioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954; as amended by the Civil Rights Act of Sept. 9, 1957."

It appears apparent, conclusive and without question, that Petitioner has set forth a claim upon which relief can be granted, and that proper jurisdiction was in the Federal District Courts.

And in 13 A.L.R. 2d 456, what appears to Petitioner, a pertinent observation:

"Similarly, in *Douglas Park Jockey Club* v. *Granger*, 1906, C.C. Ky. 146 Fed. 414, revd. on other grounds (C.A. 6th) 148 Fed. 513, 8 Ann. Cas. 997, the Court held that it was settled that when state officers, in the exercise or attempted exercise of their official authority, deny to any citizen the equal protection of the laws or deprive him of his property without due process of law, the state itself does so and such official action, comes within constitutional prohibitions." * * *

"* * * and that a federal court of equity, upon a proper showing that such orders are in conflict with those provisions of the federal Constitution, has the power to grant relief. * * *"

And from the Opinion, and cited therein, is 13 A.L.R. 2d 467:

> "Effect of allegation attacking state court judgments. As a matter of substantive constitutional law, there is no doubt that a state court judgment constitutes 'state action' within the purview of the due process clause of the Fourteenth Amendment and that such a judgment may, under particular circumstances, deprive a litigant of life, liberty, or property without due process of law."

That the "federal Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made under their Authority * * *" is clear in the recent case of *Baker* v. *Carr*, 1962, 82 S. Ct. 691, as follows:

> "Dismissal of the complaint upon the ground of lack of jurisdiction of the subject matter would therefore, be justified only if that claim were 'so attenuated and unsubstantial as to be absolutely devoid of merit.' *Newburyport Water Co.* v. *Newbury Port*, 193 U.S. 561, 579, 24 S. Ct. 553, 557, 48 L. Ed. 795, or 'frivolous', *Bell* v. *Hood*, 327 U.S. 678, 683, 66 S. Ct. 773, 776, 90 L. Ed. 939: That the claim is unsubstantial must be 'very plain'. * * *
>
> "We conclude that the Complaint's allegation of a denial of equal protection present a justifiable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

Respondents have argued, *without any authority*, that Petitioner's only remedy, "was by way of petition for certiorari to the United States Supreme Court" and the United States Court of Appeals, 5th Circuit, contends in its Opinion that Petitioner "lost the only avenue of relief available to her in the federal courts" by her failure to seek review of the Order of the Supreme Court of Florida of January 23, 1952, dismissing her appeal. The real issue to

be resolved, however appears to be, whether a denial of certiorari is a prerequisite to resort to the District Courts.

This is discussed and resolved in the Florida criminal case of *Wade* v. *Mayo*, 68 S. Ct. 1270, 334 U.S. 672, which held:

> "Where state remedies for relief for deprivation of federal constitutional rights have been exhausted, choice lies between applying directly to supreme Court for review of constitutional issue by certiorari or instituting an original habeas corpus proceeding in the federal district court, and where it appeared even possible that writ of certiorari would be denied without any consideration of the merits, failure to file petition for writ of certiorari should not prejudice right to file habeas corpus application in district court."
>
> "* * * Since Wade chose the latter alternative and pursued it through to the Supreme Court of Florida, he has done all that could be done to secure a determination of his claim by the Florida courts." * * *
>
> "* * * The exhaustion of but one of several available alternatives is all that is necessary." * * *

In the decision of *Darr* v. *Burford*, 70 S. Ct. 587, citing *Wade* v. *Mayo*, 334 U.S. 672, 68 S. Ct. 1270, 92 L. Ed. 1647, the case above, the United States Supreme Court said:

> "* * * Respect for an explicit adjudication on a matter of procedure very recently rendered after the fullest consideration, as well as the soundness of the decision, should lead us to adhere to *Wade* v. *Mayo*."
>
> "—That question—whether a petition for certiorari is to be deemed part of the 'state remedies'—had never been canvassed by this Court—But the problem had never been critically analyzed until the issue became determinative of the decision in *Wade* v. *Mayo*.'
>
> "—that decision was a product of the deliberate process at its weightiest."

"The procedural issue which received this attention was thus phrased in the Court's opinion."

"The requirement that state remedies be exhausted before relief is sought in the federal courts is grounded primarily upon the respect, which federal courts have for the state judicial processes and upon the administrative necessities of the federal judiciary."

"State Courts are duty bound to give full effect to federal Constitutional rights and it cannot be assumed that they will be derelict in their duty. Only after state remedies have been exhausted without the federal claim having been vindicated may federal courts properly intervene. Indeed, any other rule would visit upon federal courts an impossible burden forcing them to supervise the countless state criminal proceedings in which deprivations of federal Constitutional rights are alleged."

"But the reasons for this exhaustion principle cease after the highest state Court has rendered a decision on the merits of the federal constitutional claim. The state procedure has then ended and there is no longer any danger of a collision between federal and state authority. The problem shifts from the consummation of state remedies to the nature and extent of the federal review of the Constitutional issue. The exertion of such review at this point, however, is not in any real sense a part of the state procedure. It is an invocation of the federal authority growing out of the supremacy of the Federal Constitution and the necessity of giving effect to that supremacy if the state processes have failed to do so." * * *

"But the factors which make it desirable to present the constitutional issue directly and initially to this Court do not justify a hard and fast rule to that effect; especially in view of the volume of this Court's business."

"While fully acknowledging the principles that State remedies must be exhausted before relief can be

sought in a federal court, it rejected the notion that an application to this Court for review by certiorari can be deemed part of the State remedies."

"The significance of a denial of a petition for certiorari ought no longer to require discussion. This Court has said again, and again and again that such a denial has no legal significance whatever bearing on the merits of the claim. The denial means that this Court has refused to take the case. It means nothing else. The State Court's judgment is left undisturbed without any legal reinforcement whatever of the views which the State Court expressed."

"Meaningless multiplication of steps in the legal process can hardly be deemed a virtue in judicial administration. Nor would it be more respectful of the dignity of a State Court for the District Court to disagree with the State Court's view of federal law if such disagreement came after this Court had denied certiorari rather than before."

Petitioner respectfully submits that from the foregoing authorities, it is apparent that the United States District Court for the Southern District of Florida had vested Federal and Equitable Jurisdiction in the instant cause and can restrain successful parties from enforcement of the judgment fraudulently obtained in State Court without due process of law; and that Petitioner was diligent and sought relief repeatedly, properly, continuously, consistently, conscientiously and lawfully in the Florida Circuit, Appellate and Supreme Courts, in the firm belief that they would not be derelict in their duty, without success, contrary to the Florida Laws, and the Constitution of the United States; and that State Court remedies were thoroughly exhausted and concluded before proceeding to the Federal District Court.

That the facts as stated, are undisputed.

However, there is admitted utter confusion, and expressed concern in the opinions of the Federal Courts below the level of this Court as to the rule of "Comity" and Title 28, Section 2283, particularly the scope of the prohibition, its limitation and its recognized exceptions; and the application and interpretation of the said Statute in this sensitive and delicate area which should be resolved, particularly where Constitutional Rights are involved.

That the requirement that State Court remedies be exhausted before relief is sought in the Federal Courts is also a questioned area, where the guidelines are unsure, and the policy inconsistent, particularly in a Civil suit, as to whether a petition for certiorari is to be deemed a part of "state remedies", which is often futile, before proceeding to the Federal District Court for the protection of Constitutional and Civil Rights; and whether the Supremacy of the United States Constitution, and its Guarantees of Individual Rights shall prevail over the persuasion of *"Comity"* and *successful fraud.*

In conclusion petitioner, having an incomplete knowledge of law, addresses the heart of the Court and the logic of the mind as to the wrong and the remedy, and that this Court, in the exercise of its broad jurisdictional powers, grant certiorari and review this case.

Respectfully submitted,

FRANCES OWEN WARRINER,
2663 S. W. 27th Street,
Miami 33, Florida,
In Proper Person. Petitioner.

CERTIFICATE OF SERVICE

I Hereby Certify that a true copy of the foregoing Petition for Writ of Certiorari was mailed to Sibley, Grusmark, Giblin, King & Levinson, Attorneys for Respondents, 605 Lincoln Road, Miami Beach, Florida, this _____ day of February, 1963.

_____

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 19131

FRANCES O. WARRINER,
Appellant,

VERSUS

HARRY FINK, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(September 13, 1962).

Before RIVES, JONES and GEWIN, Circuit Judges.

RIVES, Circuit Judge: This appeal is from a judgment dismissing a complaint for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The voluminous record consists mostly of legal conclusions, briefs and arguments. The complaint alone, with its exhibits, comprises ninety pages of the printed record. When the facts are ultimately distilled, however, they are comparatively simple. They can be best understood by stating them in chronological order.

On August 17, 1948, the plaintiff executed a mortgage on certain very valuable lands located in Monroe County, Florida, in the amount of $10,000.00. The mortgage was actually to Sam Kay, but was taken in the name of his brother-in-law, Morris Resnick. Kay knowingly exacted interest in excess of 25% in violation of Florida Statutes 687.07. The complaint alleges that a proper application of payments and credits would completely extinguish and discharge the debt.

On January 31, 1950, the plaintiff executed a rewritten mortgage for $10,500.00 founded upon the same debt. Kay agreed to give her $3,000.00 previously withheld and an additional $500.00, but later refused to do so. While the mortgage was rewritten by Sam Kay and he was the real party in interest, it was taken in the name of Henry H. Herman. The rewritten mortgage was without any consideration moving to plaintiff. Sam Kay was at all times the real party in interest, and Henry H. Herman, Marilyn Kay, Harry Fink and others conspired with Sam Kay to perpetrate a fraud on the plaintiff. On February 21, 1950, Herman transferred the mortgage to Marilyn Kay. On July 26, 1950, Marilyn Kay transferred it to Harry Fink. On October 26, 1960, Harry Fink filed his bill to foreclose the mortgage in the Circuit Court of Monroe County, Florida.

The plaintiff, Frances O. Warriner, employed an attorney to defend the foreclosure suit, and filed an answer admitting the residence and age of the parties but denying all other allegations. The complaint alleges:

> "That on December 22, 1950, just three days before Christmas, Cisco [Mrs. Warriner's attorney], was tricked into a stipulation with Harold Kassewitz, attorney for Harry Fink, who concocted an unauthorized stipulation, intended and calculated to deprive the

plaintiff herein, of her constitutional rights, of due process of law; and which, in effect, waived all of her substantial rights, erroneously, unlawfully and irregularly, without her knowledge, consent or approval, and was unauthorized as these attorneys then knew; and that the plaintiff herein was thus defrauded out of an opportunity to present her meritorious defense in the original action thereby, to her great damage and injury."

Attached to the complaint are affidavits of both of plaintiff's former attorneys. Attorney Cisco's affidavit reads as follows:

"In that certain cause pending in the Circuit Court of the Eleventh Judicial Circuit in and for Monroe County, Florida, in Chancery, No. 12-516, entitled 'Harry Fink, Plaintiff vs. Frances O. Warriner, Defendant,' upon request of the defendant I prepared an answer to the Bill of Complaint filed in the above entitled cause and traversed said bill placing plaintiff upon due proof to establish the allegations of said Bill of Complaint; had I known at said time that a special defense, to-wit, usury, was involved, I would have set same up in said answer.

"Thereafter, I entered into a stipulation with Harold Kassewitz, attorney for plaintiff, and at his request, wherein and whereby final decree could be entered by the Court having jurisdiction of the subject matter of the suit and that the sale of the property was to be postponed beyond the time of the due process provided under the statutes and rules of the Court.

"The sole purpose and consideration (as cited in said stipulation) for the execution of said stipulation was to give the defendant an extension of time prior to the sale date within which to either pay the indebtedness, bid at sale or refinance her property. The record shows that no additional time beyond the statutory period was, in fact, extended to said defendant,

which was not the purpose of such stipulation or the agreement between counsel.

"In addition the stipulation did not waive the necessity on the part of the plaintiff to introduce evidence to establish the debt sued upon, that is to say, the introduction into evidence and proof of the note or notes and mortgage securing same.

"I have no independent recollection, nor have I any notes or records as to whether or not the stipulation was discussed by me with Mrs. Warriner, but in any event, it would have never been executed by me execept with the express understanding that a reasonable period of time was to be given to the defendant beyond the time which was allowed under the statute."

Relying upon the fraudulent stipulation, the court on December 28, 1950 entered a final decree finding Mrs. Warriner's indebtedness under the mortgage to be $11,458.40, plus $31.85 cost of abstract, plus $750.00 attorney's fee, and ordering the property sold by a special master to the highest and best bidder on February 5, 1951. At that sale Harry Fink became the purchaser "for the egregiously low sum of $1,000.00." The plaintiff had been kept in ignorance of the fraudulent stipulation, the final decree and the sale.

As soon as the plaintiff learned of those events, she employed other counsel, repudiated the unauthorized stipulation, and on March 6, 1951 filed her motion to set aside the final decree and the master's sale, and requested that she be allowed to offer her defense to the bill of foreclosure. The court, on September 20, 1951, granted the motion to set aside the sale, but denied the motion to set aside the final decree, and thus deprived plaintiff of her right to defend against the bill of foreclosure. The master conducted another sale on October 15, 1951, and Harry Fink again became the purchaser, but this time "for the egregiously low sum of $5,000.00." The master filed his report of sale on

October 22, 1951, and a motion for confirmation was set for hearing on November 9, 1951, but was not heard because plaintiff's then attorney, Leland Hyzer, filed a notice of appeal the preceding day.

The transcript of record was filed in the Supreme Court of Florida on January 10, 1952. Two days later Harry Fink, the appellee, filed a motion to dismiss the appeal in which he undertook to deceive the Court into ruling that the appeal was from the decree of December 28, 1950, when in reality it was from the order of September 20, 1951. Plaintiff's then attorney, Leland Hyzer, wrote a letter to the Clerk of the Supreme Court of Florida explaining that, "the notice of appeal was taken from that portion of the Circuit Court's order denying the motion to set aside the final decree," and that, "it is our position that the record has been properly filed in accordance with Rule No. 12." Nonetheless, the Supreme Court of Florida on January 23, 1952 dismissed the appeal without any consideration of the merits, but sustaining Harry Fink's motion that the transcript of the record on appeal was not filed within time.

The plaintiff has since litigated extensively in Florida in an effort to have her defense to the foreclosure of the mortgage heard on its merits, but always without success. She now brings the present complaint to enjoin the defendants from enforcing the final decree of foreclosure, and to attack that decree as void. No diversity of citizenship is alleged. Instead, in the complaint filed in her own proper person, the plaintiff expresses her theory of the federal court's jurisdiction as follows:

> "This action arises under the Constitution of the United States, the First, Fifth and Fourteenth Amendments, thereof, the 'Taking of Property Without Due Process of Law,' and the 'Denial of Equal Protection Under the Laws of the Land,' as hereinafter more fully and particularly appears. This is a civil suit brought

for the purpose of declaring null and void and enjoining the enforcement of a certain order of the Circuit Court of the Sixteenth Judicial Circuit, in and for Monroe County, Florida, In Chancery, entitled 'Final Decree of Foreclosure,' entered December 28, 1950, and Recorded in Chancery Order Book A-7 at Pages 34/42, which seeks to deprive the plaintiff of her property without due process of law and denies the plaintiff the equal protection of the laws in violation of her rights under the First, Fifth and Fourteenth Amendments to the Constitution of the United States and that the order is therefore illegal, null and void . . ."

The plaintiff has appeared and argued the case very creditably in her own behalf and has impressed the Court with her sincerity. It is for that reason and to enable her the more easily to petition for review of our judgment in the Supreme Court of the United States, if she so desires, that we have set forth the facts alleged in the complaint in such detail.

The plaintiff insists that through no fault of her own she is being deprived of valuable properties without any hearing on the merits of her defense to the bill of foreclosure and thus without due process of law. Her argument is that the purported final decree of foreclosure is an absolute nullity because of fraud practiced on the court, and that a federal district court can enjoin a party from enforcement of such a void judgment under such authorities as *Simon* v. *Southern Railway Company*, 1915, 236 U.S. 115, and *Johnson* v. *First National Bank*, 10 Cir., 1955, 223 F.2d 31.

We are convinced, however, that when the plaintiff failed to seek review by the Supreme Court of the United States of the judgment of the Supreme Court of Florida of January 23, 1952 dismissing her appeal, she lost the only avenue of relief available to her in the federal courts. In the

light of the anti-injunction statute, 28 U.S.C.A., §2283, and of a number of decisions of the Supreme Court and of this and other Circuits, in which the principles are fully discussed, we hold that the federal district court had no jurisdiction to enjoin the enforcement of, or to set aside, or hold null and void the decree of foreclosure entered by the Circuit Court of Monroe County, Florida. See *Rooker* v. *Fidelity Trust Co.*, 1923, 263 U.S. 413; *Toucey* v. *New York Life Ins. Co.*, 1941, 314 U.S. 118; *Chicago Life Ins. Co.* v. *Cherry*, 1917, 244 U.S. 25, 30; *Manufacturer's Record Publishing Co.* v. *Lauer*, 5 Cir., 1959, 268 F.2d 187; *T. Smith & Son, Inc.* v. *Williams*, 5 Cir., 1960, 275 F.2d 397, 402 et seq.; *Hanna* v. *Home Insurance Company*, 5 Cir., 1960, 281 F.2d 298; *Sexton* v. *Barry*, 6 Cir., 1956, 233 F.2d 220; numerous cases collected in Annotation 13 A.L.R. 2d, pp. 467, et seq. §23. The judgment is therefore AFFIRMED.

JONES, Circuit Judge, Concurs in the Result.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By /s/ G. F. Ganucheau
Deputy

New Orleans, Louisiana, October 8, 1962.
(Seal)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,131

D. C. Docket No. 10,395-M-Civ.

FRANCES O. WARRINER,
Appellant,

versus

HARRY FINK, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before RIVES, JONES and GEWIN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Frances O. Warriner, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Jones, Circuit Judge, Concurs in the Result."

September 13, 1962

Issued:

HAROLD KASSEWITZ
Attorney and Counselor at Law
240 Shoreland Arcade Building
Miami 32, Florida

November 7, 1951

(Filed and Docketed December 9, 1954. Earl R. Adams, Clerk. By Florence E. Sawyer, D. C.)

Hon. Aquilino Lopez, Jr.
Circuit Judge
Monroe County
Key West, Florida

Re: Fink vs. Warriner, Chancery No. 12516

Dear Judge Lopez:

In the above case I have set a hearing on plaintiff's Motion for Confirmation of the Master's Sale and for Deficiency Decree for Friday, November 9, 1951, at 11:00 A. M. The Notice of Hearing has been filed with your Clerk.

Mr. Hyzer advises me that he does not expect to be at the hearing. Accordingly, I see no necessity for my being there, especially in view of the statements made by you at the last hearing to the effect that if you set aside the first Master's sale (which you did), you would expect to grant a deficiency decree for any deficiency that resulted from a second Master's sale. Accordingly, I have prepared a form of order confirming sale, including a deficiency decree.

Please note that the amount of the deficiency has been left blank because the amount of the Special Master's fee has not been determined. As shown in paragraph (d) of my Motion for Confirmation, the plaintiff is entitled

to a deficiency in an amount equal to the difference between $5,000.00 and the aggregate of $12,826.51, plus the amount fixed for the Special Master's fee.

If you see fit to sign the Order, I shall greatly appreciate it if your secretary would conform the enclosed copy and return it to me.

Very truly yours,

/s/ Harold Kassewitz
Harold Kassewitz

HT vo
Enc.

HAROLD KASSEWITZ
Attorney and Counselor at Law
240 Shoreland Arcade Building
Miami 32, Florida

January 23, 1952

(Filed and Docketed December 9, 1954. Earl R. Adams, Clerk. By Florence E. Sawyer, D. C.)

Hon. Aquilino Lopez, Jr.
Circuit Judge
Monroe County
Key West, Florida

Dear Judge Lopez:

You will recall that the defendant in the above cause filed her appeal with the Supreme Court to review your order denying her Motion to Set Aside the Final Decree. On January 21, 1952, the Supreme Court entered its order dismissing the Appeal, a true copy of the said Order having been received by me.

I call your attention to my letter to you dated November 7th, 1951, enclosing a form of Order Confirming Master's Sale. I shall appreciate your signing the Order if you have not already done so.

With respect to the deficiency decree contained in the said Order, you will recall that at the hearing before you at which you set aside the first Master's Sale, you indicated that you would expect to grant a deficiency decree for any deficiency which resulted from the second Master's Sale held on October 15th, 1951. The amount to which the plaintiff is entitled is the sum of $12,026.51, plus whatever amount is fixed by you as the Special Master's fee. The amount bid by the plaintiff at the Master's Sale on October 15th, 1951, was the sum of $5,000.00. Accordingly,

the plaintiff is entitled to the deficiency, in the form of a deficiency decree.

With respect to the amount of the Special Master's fee, you will recall that there was no testimony taken in this cause, and that his services consisted of advertising the first and second sales and holding the two sales, as well as execution and delivery of a Special Master's Deed.

When the Order has been signed I would greatly appreciate it if your secretary would conform the copy of the Order enclosed in my letter of November 7th, and return it to me.

Very truly yours,

/s/ Harold Kassewitz
Harold Kassewitz

HT:mbs

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 817

FRANCES O. WARRINER,
Petitioner,

vs.

HARRY FINK, IRVING POLLACK, MARCELLA POLLACK AND LOAN STAR, INC., Licensed and Organized to Do Business in the State of Florida, SAM KAY, MARILYN THAL, Formerly MARILYN KAY, and SIDNEY THAL, Each Individually and As Officers, Agents, Employees and Servants of Said Defendant Corporation, and All Jointly and Severally,
Respondents.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statement of the Case 2

Argument—

I. Does the decision of the United States Court of Appeals, rendered herein, conflict with any other decision so as to warrant further review by this Court? 6

II. Does a Federal District Court have jurisdiction to review, vacate and set aside judgments of the Supreme Court of Florida where no timely and appropriate appeal to the United States Supreme Court was taken? 9

Conclusion 18
Certificate of Service 19

Table of Cases

Hanna v. *Home Insurance Co.*, (1960) 281 F.2d 298 ... 17
Johnson v. *First National Bank*, 223 F.2d 31 ..... 7, 13
Manufacturers Record Publishing Company v. *Lauer*, (1959) 268 F.2d 187 ..... 13, 15
Rooker et al. v. *Fidelity Trust Co.*, 463 U.S. 413, 44 S. Ct. 149 10
Sexton v. *Barry*, 233 F|2d 220, Certiorari denied 77 S. Ct. 94 11
Simon v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. Ed. 492 ..... 7, 13
T. Smith and Son, Inc., v. *Williams*, 275 F.2d 397 (1960) 18

Statutes

28 U.S.C., Sec. 1257 9
28 U.S.C.A., Sec. 2283 18

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit, to which this Petition for Certiorari is directed is reported in 307 F.2d 933, and was rendered by said Court on September 13, 1962.

JURISDICTION.

The Petition for Writ of Certiorari was filed, in this Court, on February 8, 1963. The jurisdiction of the Supreme Court of the United States is apparently invoked under the provisions of 28 U.S.C., § 1254.

QUESTIONS PRESENTED.

I.

Does the decision of the United States Court of Appeals, rendered herein, conflict with any other decision so as to warrant further review by this Court?

II.

Does a Federal District Court have jurisdiction to review, vacate and set aside judgments of the Supreme Court of Florida where no timely and appropriate appeal to the United States Supreme Court was taken?

STATEMENT OF THE CASE.

The Petitioner, Frances O. Warriner, on November 30, 1960, instituted suit in the United States District Court seeking a review of "* * * all orders, rulings, decrees, and all other deeds, conveyances entered in this certain suit in the Circuit Court of the Eleventh and/or Sixteenth Judicial Circuit, in and for Monroe County, Florida, In Chancery, Case No. 12516 * * *". In her prayers for relief petitioner-plaintiff asked the District Court for injunctive relief against the respondents herein to prevent their right to lawful enjoyment of the final judgments rendered by

the trial courts, and affirmed by the appellate courts of the State of Florida in Case No. 12,516.

The orders petitioner complains of arose out of a complaint orginally filed by the defendant, Harry Fink, against Mrs. Warriner in Monroe County Circuit Court October 26, 1950, whereby Mr. Fink sought to foreclose the mortgage posted by the petitioner as collateral security for a loan.

The chronology of events in this controversy is:

Oct. 26, 1950.	Mr. Fink filed suit to foreclose mortgage against Warriner.
Dec. 28, 1950.	Final Decree of Foreclosure.
Sept. 20, 1951.	Circuit Court Order denying Motion of Warriner to set aside Final Decree.
Nov. 10, 1951.	Warriner filed Notice of Appeal to Review Order of September 20, 1951.
Jan. 23, 1952.	Supreme Court of Florida dismissed Warriner's Appeal.
Jan. 29, 1952.	Cicuit Court Order Confirming Master's Sale.
Jan. 30, 1952.	Master's Deed recorded, conveying mortgage property to Appellee Fink.
Feb. 12, 1952.	Warriner filed new suit in Circuit Court in nature of Bill of Review.
June 25, 1952.	Circuit Court Order Denying Motion to Dismiss said new suit.
Jan. 20, 1953.	Supreme Court granted Certiorari Directing Dismissal of said new suit.
Apr. 7, 1952.	Warriner filed Motion in Circuit Court to Vacate Order Confirming Master's Sale dated January 29, 1952.
Sept. 18, 1953.	Circuit Court entered Order Denying Motion.
Oct. 6, 1953.	Warriner filed Petition for re-hearing addressed to Order of September 18, 1953.

Oct. 8, 1953.	Warriner filed Supplemental Petition for re-hearing addressed to Order dated September 18, 1953.
Sept. 9, 1954.	Circuit Court entered Order Denying said Petition and Supplemental Petition for re-hearing.
Sept. 28, 1954.	Warriner filed Notice of Appeal from Order dated September 9, 1954.
Jan. 5, 1955.	Supreme Court denied Warriner's Petition for Writ of Certiorari.
Nov. 26, 1955.	Warriner filed an original proceeding in the Supreme Court entitled "Application and/or Petition for Writ of Supervisory Control and/or Other Relief" brought against "Circuit Court of the Sixteenth Judicial Circuit in and for Monroe County, Florida, and Judge Aquilino Lopez, Jr. and Harry Fink".
May 31, 1956.	Supreme Court entered Order denying said application.
June 12, 1956.	Warriner filed Request for Determination En Banc of her petition for rehearing and for review on application and/or petition for Writ of Supervisory Control.
June 14, 1956.	Supreme Court entered its Order denying said application.
July 27, 1956.	Supreme Court denied Warriner's Petition for rehearing.
Sept. 18, 1956.	Supreme Court denied Warriner's Motion for Leave to file Extraordinary Motion for Petition for Rehearing and Review.
Oct. 25, 1956.	Warriner filed instant suit in Circuit Court in nature of Bill of Review.
Mar. 5, 1958.	Circuit Court entered its Order Dismissing Complaint with Prejudice.
Oct. 21, 1958.	District Court of Appeal quashed Warriner's Appeal from Circuit Court of Monroe County.

Nov. 5, 1958.	Warriner filed Petition for Rehearing.
Nov. 19, 1958.	District Court of Appeal denied Petition for rehearing.
Jan. 14, 1959.	Warriner filed Notice of Appeal to Supreme Court of Florida.
Mar. 4, 1959.	Supreme Court dismissed Warriner's Appeal.
Apr. 15, 1959.	Petition for rehearing denied by the Supreme Court.
Apr. 21, 1959.	Warriner filed in District Court of Appeal "Extraordinary petition for review and/or rehearing and/or clarification of opinion".
Apr. 23, 1959.	District Court denied Petition.
May 21, 1959.	District Court of Appeal denied the third Petition for Rehearing filed by Warriner and ordered, "That any further such unauthorized petitions for rehearing or similar pleadings if presented in the above styled cause shall be stricken upon presentation".
Oct. 7, 1959.	Supreme Court of Florida denied Warriner's petition to "vacate and set aside its opinion filed January 20, 1953".
Oct. 25, 1959.	Warriner filed Notice of Intention (In Supreme Court of Florida) to appeal to the Federal District Court of Appeal or the United States Supreme Court, alleging her constitutional rights had been invaded.
Nov. 2, 1959.	Interlocutory appeal filed by Warriner in the Supreme Court of Florida.
Dec. 16, 1959.	Supreme Court dismissed with prejudice purported interlocutory appeal.
Nov. 30, 1960.	Warriner filed Complaint in United States District Court for Southern District of Florida, seeking to vacate all of the foregoing orders, judgments and decrees (almost one year later).
Dec. 16, 1960.	Respondents defendants moved to dismiss the complaint on the ground that the Fed-

eral District Court had no jurisdiction to review and consider the orders, judgments and decrees of the trial and appelate courts of the State of Florida.

Feb. 28, 1961. The United States District Judge granted the Motion to Dismiss and entered an Order of Dismissal.

Apr. 7, 1961. Warriner filed Notice of Appeal, seeking review by the United States Court of Appeals of the Order of Dismissal.

Sept. 13, 1962. United States Court of Appeals Opinion affirming the judgment of the United States District Court.

Feb. 8, 1963. Petition for Writ of Certiorari to the United States Court of Appeals (in the Supreme Court of the United States).

ARGUMENT.

I.

Does the decision of the United States Court of Appeals, rendered herein, conflict with any other decision so as to warrant further review by this Court?

The judgment of the Circuit Court of Appeals, brought here for consideration upon a Petition for Certiorari, is not in conflict with any other reported decision so as to warrant further review of the case by this Honorable Court.

In its opinion, the Circuit Court (A1-7), 307 F.2d 933, held:

> "We are convinced, however, that when the plaintiff failed to seek review by the Supreme Court of the United States of the judgment of the Supreme Court of Florida of January 23, 1952 dismissing her appeal, she lost the only avenue of relief available to her in the federal courts. In the light of the anti-injunction

statute, 28 U.S.C.A., Sec. 2283, and of a number of decisions of the Supreme Court and of this and other Circuits, in which the principles are fully discussed, we hold that the federal district court had no jurisdiction to enjoin the enforcement of, or to set aside, or hold null and void the decree of foreclosure entered by the Circuit Court of Monroe County, Florida. See Rooker v. Fidelity Trust Co., 1923, 263 U.S. 413; Toucey v. New York Life Ins. Co., 1941, 341 U.S. 118; Chicago Life Ins. Co. v. Cherry, 1917, 244 U.S. 25, 30; Manufacturer's Record Publishing Co. v. Lauer, 5 Cir., 1959, 268 F.2d 187; T. Smith & Son, Inc., v. Williams, 5 Cir., 1960, 275 F.2d 397, 402 et seq.; Hanna v. Home Insurance Company, 5 Cir., 1960, 281 F.2d 298; Sexton v. Barry, 6 Cir., 1956, 233 F.2d 220; numerous cases collected in Annotation 13 A.L.R. 2d, pp. 467, et seq. Sec. 23. The judgment is therefore AFFIRMED."

The Court of Appeals acted properly in following well established law set forth in case decisions cited in their opinion, and referred to in more detail under point II of this brief. Careful examination of the authorities cited by petitioner in her brief in support of her Petition for Certiorari fail to reveal a single case authority in conflict with this opinion of the Fifth Circuit. The two cases upon which petitioner relies the most strongly to establish conflict are readily distinguishable on their facts. These two cases are *Johnson* v. *First National Bank*, 223 F.2d 31, and *Simon* v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. Ed. 492 (cited on pp. 32, 33, 35, 36, 47 and 48 of petitioner's brief).

In the Simon Case there was, first, diversity of citizenship between the parties (not present in the case at bar) and, secondly, no service of process on the defendant corporation. The State Court, therefore, had no jurisdiction over the defendant, Southern Railway, and, as the

Company made no appearance in the cause, the default judgment was void. The United States District Court properly concluded that the judgment, being void, gave no rights whatsoever to the plaintiff and the plaintiff could be enjoined by a Federal Court from attempting to enforce what was a judgment in name only, but in fact a nullity. The Court said:

> "On principle and authority, therefore, a judgment obtained in a suit of which the defendant had no notice was a nullity and the party against whom it was obtained was entitled to relief. It serves to illustrate the existence of appellee's right and the method of its enforcement to note that under the law of Louisiana the railway company was not obliged to attack a void judgment in the court that rendered it, but, in a court having jurisdiction of the plaintiff's person, could have instituted a new and independent proceeding to enjoin Simon from enforcing it."

In the case at bar, of course, Mrs. Warriner had full and ample notice of the impending mortgage foreclosure suit instituted in Monroe County, Florida, by the Respondent Fink and did in fact appear, answer, and participate. She was represented by counsel in that proceeding and vigorously asserted her rights over some thirteen years' extended litigation in both the State and Federal Court systems.

Petitioner, having failed to establish conflict between the decision of the Fifth Circuit Court of Appeals, and any other decision of the Supreme Court of the United States or another Circuit Court of Appeals, is not entitled to a second review of the Order of the District Court dismissing her complaint for lack of jurisdiction to try the case.

II.

Does a Federal District Court have jurisdiction to review, vacate and set aside judgments of the Supreme Court of Florida where no timely and appropriate appeal to the United States Supreme Court was taken?

The petitioner herein did not seek review of the adverse judgment of the Supreme Court of the State of Florida, rendered December 16, 1959, until approximately one year later (November 30, 1960), at which time she instituted these proceedings in the District Court of the Southern District of Florida. Her appropriate remedy, under the cases hereinafter cited, was to seek appellate review of the adverse decision of the Florida Supreme Court directly in the United States Supreme Court. 28 U.S.C., Sec. 1257, gives any citizen of the United States the right to such recourse, but petitioner's defalcation was in failing to seek appellate review within the time prescribed by the Code. A Petition for Certiorari to the United States Supreme Court to review an adverse decision of the Florida Supreme Court, filed approximately one year after the rendition of the adverse decision by the State Court, would be subject to a Motion to Dismiss or quash for lack of timely filing. Obviously then, a complaint filed in the United States District Court seeking the same review of the decision of the highest appellate tribunal in the State of Florida, is subject to dismissal upon the same ground.

There have been a number of recent decisions wherein the United States Supreme Court and certain Circuit Courts of Appeals have passed upon the jurisdiction of the Federal District Court to entertain suits seeking, as their ultimate relief, either (1) an injunction against State Court proceedings, or (2) the vacating of an opinion, decision or decree of a State Court.

On facts similar to those in the case at bar, the Courts have unanimously held the plaintiff must show a purposeful conspiracy to deny him due protection under the law, and not mere error or irregularity in the State Court proceeding. In *Rooker et al.* v. *Fidelity Trust Co.*, 463 U.S. 413, 44 S. Ct. 149, this Honorable Court said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject-matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 131 N.E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the State Courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L. Ed. 381; Voorhees v. Bank of United States, 10 Pet. 449, 474, 9 L. Ed. 490; Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782, 7 S. Ct. 780, 30 L. Ed. 824. Under the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors of that character. Judicial Code, Sec. 237, as amended by Act September 6, 1916, c. 448, Sec. 2, 39 Stat. 726 (Comp. St. Sec. 1214). To do so would be an exercise of appellate jurisdiction. The jurisdiction possessed by the District Courts is strictly original. Judicial Code, Sec. 24 (Comp. St. Sec. 991). *Besides, the period within which a proceeding might be begun for the correction of errors such as are charged in the bill had expired before it was filed,* Act September 6, 1916, c.

448, Sec. 6, 39 Stat. 726 (Comp. St. Sec. 1228a), *and as is pointed out in Voorhees* v. *Bank of United States, supra, after that period elapses an aggrieved litigant cannot be permitted to do indirectly what he no longer can do directly.*" (Emphasis added)

The United States Court of Appeals of the Sixth Circuit was confronted with this identical problem in *Sexton* v. *Barry*, 233 F.2d 220, Certiorari denied 77 S. Ct. 94. There, the appellant Sexton sought an injunction against certain proceedings in the State Courts of Ohio. The United States District Judge dismissed the complaint and, in affirming the dismissal, the Court of Appeals held:

> "Moreover, it is the settled law that the District Court in the exercise of its equity powers will not review in an independent action orders entered by a State Court."
>
> * * *
>
> "What appellant asks is that this court order the District Court to relitigate the same issues which have now been finally disposed of by the Supreme Court of Ohio in a judgment binding on this court. As held by this court in General Exporting Co. v. Star Transfer Line, 6 Cir. 136 F.2d 329, 335, a Federal District Court will not function as a court of review for the State Court. The District Court there dismissed an action praying that proceedings in the State Court be declared null, void, and of no effect, and this court affirmed the decision of the District Court, stating:
>
> > 'The attempt to relitigate in federal courts issues already determined in state court proceedings has been disapproved in numerous opinions of United States Courts below the grade of the Supreme Court. Ritholz v. North Carolina State Board of Examiners in Optometry, D.C. N.C., 18 F. Supp. 409, 413 (three judge court); Davega-City Radio v. Boland, D.C. N.Y., 23 F. Supp. 969, 970 (three-judge

court); Hall v. Ames, 1 Cir., 190 Fed. 138, 140, 141; Furnald v. Glenn, 2 Cir., 64 Fed. 49, 54.'

Cf. Davega-City Radio, Inc., v. Boland, D.C. S.D. N.Y., 23 F. Supp. 969, 970, in which the court declared:

'There is also a further reason why the suit must be dismissed, namely, the principle that a decision of a state court may not be reviewed by bill in equity in a federal court. American Surety Co. v. Baldwin, 287 U.S. 156, 164, 53 S. Ct. 98, 100, 77 L. Ed. 231, 86 A.L.R. 298; Lynch v. International Banking Corp., 9 Cir., 31 F.2d 942, certiorari denied 280 U.S. 571, 50 S. Ct. 28, 74 L. Ed. 624; Furnald v. Glenn, 2 Cir., 64 Fed. 49, 54; Ritholz v. North Carolina State Board, D.C. M.D. N.C., 18 F. Supp. 409, 413. Here the plaintiff has presented to the state court the same questions as to the jurisdiction of the State Board that it wishes this Court to decide. The issue having been decided adversely to it, its remedy is appeal through the appropriate state courts and, if necessary, review by the Supreme Court of the United States. It cannot obtain a review by this independent suit in the federal court.'

See also H. J. Heinz Co. v. Owens, 9 Cir., 189 F.2d 505, 509.

"It is shown upon the face of this complaint that appellant regularly invoked the jurisdiction of the state court, the case was tried, judgment was rendered and eventually affirmed by the Supreme Court of Ohio. It is clear that appellant was not denied due process of law or the equal protection of the law under the Civil Rights Act, 42 U.S.C.A., Sec. 1981 et seq. This Act does not create an exception to the general principle that a decision of the state court may not be reviewed by bill in equity in a federal court. Davega-City Radio, Inc., v. Boland, supra; Bottone v. Lindsley, 10 Cir., 170 F.2d 705."

The Fifth Circuit Court of Appeals in *Manufacturers Record Publishing Company* v. *Lauer*, (1959) 268 F.2d 187, considered a case in which the plaintiff appellants sought to have the judgment of a Louisiana Supreme Court adjudged void and a party enjoined therein from executing judgment upon the ground that the judgment was a nullity. In affirming the action of the Federal District Court in dismissing the complaint the Court of Appeals, Hutcheson, Chief Judge, held that a decision of a State Court, having jurisdiction over the persons and subject matter, cannot be attacked in either a State or Federal Trial Court as being without binding force and effect in the absence of fraud, accident or mistake which deceives the Court into a wrong decree.

In the case at bar there is no contention made by petitioner that the Florida Courts lacked jurisdiction over the parties to the litigation and the subject matter. It is her contention, as is found by the Court of Appeals in the opinion here sought to be reviewed, "her argument is that the purported Final Decree of Foreclosure is an absolute nullity because of fraud practiced on the Court, and that a Federal District Court can enjoin a party from enforcement of such a void judgment under such authorities as *Simon* v. *Southern Railway Company*, (1915) 236 U.S. 115, and *Johnson* v. *First National Bank*, 10 Cir., 1955, 223 F.2d 31." Although finding that Mrs. Warriner had been represented by counsel throughout the State Court proceedings, the Circuit Court stated at page 5 of its opinion, "relying upon the fraudulent stipulation, the Court, on December 28, 1950, entered a Final Decree finding Mrs. Warriner's indebtedness under the mortgage to be $11,458.40, * * *".

The "fraudulent stipulation" referred to is a stipulation entered into between one Harold Kassewitz, Attorney for the plaintiff, Harry Fink, and an attorney named Cisco

(Mrs. Warriner's attorney), agreeing to the entry of a final decree upon the consideration that the defendant (Warriner) be given an extension of time prior to sale of the property within which to either pay the indebtedness, bid at the sale, or refinance her property (Opinion page 4). The execution of this stipulation was an arms-length transaction. Attorney Kassewitz entertained no fiduciary relationship to Mrs. Warriner or her attorney and it must be presumed that counsel for Mrs. Warriner knew and understood what he was doing in executing the stipulation. Assuming however, for the purpose of argument, that a conspiracy existed between the two lawyers to deprive Mrs. Warriner of her property; we are then asked to believe that the Circuit Court of Monroe County participated in the conspiracy by depriving the petitioner herein of her rights under the stipulation, namely, time within which to either pay the indebtedness, bid on the property, or refinance her loan. That the Court was no part to any alleged conspiracy is obvious by the facts as found in the record and set forth at page 5 of the opinion of the Fifth Circuit Court of Appeals. The Circuit Court of Monroe County, on September 20, 1951, set aside the sale and ordered a new sale for October 15, 1951. This was almost one year after the original entry of the final decree. Obviously, Mrs. Warriner got everything she was entitled to under the stipulation, namely, time within which to either pay the indebtedness, bid at the sale, or refinance her loan.

The Fifth Circuit then found from the record, at page 5 of its opinion, "the transcript of record was filed in the Supreme Court of Forida on January 10, 1952. Two days later Harry Fink, the appellee, filed a Motion to Dismiss the appeal in which he undertook to deceive the Court into ruling that the appeal was from the Decree of December 28, 1950, when in reality it was from the Order of September 20, 1951."

To ask this Honorable Tribunal to actually believe that the Justices of the Florida Supreme Court could be "deceived" into a misconstruction of the date of filing an appeal or of the type and date of order appealed from, surpasses credulity. It is categorically impossible to deceive the Supreme Court of Florida on the date of the filing of an appeal!" The assumption, therefore, must be that petitioner is suggesting that the Florida Supreme Court participated in this gigantic conspiracy to defraud her of her property and that their action in dismissing her appeal was a deliberate and calculated deprivation of her right to Due Process of Law. This is so patently ridiculous as to require no further comment. One need only look at the multitude of hearings accorded petitioner at all levels of the state judicial structure to see that she has had a full, complete and final determination of all matters raised in these proceedings. The Federal District Court was, therefore, eminently correct in dismissing her complaint in the original instance. The language of Chief Judge Hutcheson in the *Manufacturers Record Publishing Company* case *supra*, is particularly pertinent. It reads, at page 191, as follows:

> "The trouble with appellant's argument is that, without attacking the judgment for fraud or want of jurisdiction or alleging what the decision and judgment show to be the contrary, it assumes that it is not a judicial decision by the highest court of the state but a mere illegal fiating of persons having no jurisdiction or authority to act by which property, conceded to belong to one, is awarded to another. The fact, of which appellant seeks to make so much, that the three dissenters attack the decision and judgment as erroneous, is proof positive that the decision was a deliberate judicial act of the highest court of the state, in which, as it had a right to do, the court divided on the appropriate judgment to be entered. As the judgment

of that court, whatever force it might have as stare decisis or a guide to future decision, it cannot be attacked in either a state or a federal trial court as without binding force and effect.

In Hudson v. Lewis, 5 Cir., 188 F.2d 679, at page 684, this court said of a similar attack upon a judgment of a Supreme Court, there of Mississippi:

> 'Quite to the contrary of the pitifully subservient place in our judicial system accorded by appellants to State Courts by their claims under the facts, federal and state courts alike have spoken, they will continue to speak, without a dissentient note in one clear strain. This is to the effect that where a court, whether state or federal, acts within the competence of its jurisdiction, no other court may collaterally attack its judgment.
>
> 'In the case particularly relied on by appellants and cases similar to those, where collateral attacks succeeded, the precise, the definite, basis of their success was that the court whose judgment was under collateral attack had not proceeded with jurisdiction. In some of them it had not acquired jurisdiction of the person or subject matter affected by the decree. In others, though it had acquired jurisdiction ,it had, thereafter, and without the actual knowledge of the complaining person, proceeded in such manner as to deny him due process, that is, a fair and reasonable opportunity to be heard.
>
> 'In short, in some of these situations, the court had not, in respect of the matter complained of, acquired jurisdiction. In others, it had proceeded beyond the jurisdiction theretofore acquired.'

Cf. Ballard v. First National Bank, 5 Cir., 259 F.2d 681, and Drawdy Inv. Co. v. Leonard, 5 Cir., 261 F.2d 226.

"What and all that appellant could have hoped to do below or could hope here was to convince the court

that the decision of the Supreme Court of Louisiana was clearly contrary to the established jurisprudence of that state, and, because it was, it was a nullity and therefore subject to collateral attack in a federal court. The law is otherwise written in all the books."

In *Hanna* v. *Home Insurance Co.*, (1960) 281 F.2d 298, the Fifth Circuit, speaking through Judge Wisdom, held that a Federal District Court has no original jurisdiction to reverse or modify the judgment of a State Court and stated the issue in that case to be the question of whether Hanna stated a complaint for damages as a result of a conspiracy to deprive him of equal protection of the law. The Court said:

"He must show a purposeful conspiracy to deny him due protection; mere errors or irregularities in the State Court proceedings are not sufficient. Snowden v. Hughes, 1944, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497. Nor does every denial of a right conferred by State law involve a denial of equal protection of law. (Cases cited) Merely characterizing defendant's conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted. (Cases cited)"

In the *Hanna* case, *supra*, the court was asked to believe that the entire state judicial structure of Texas was arraigned in a conspiracy against the plaintiff in the Federal District Court. In rejecting that contention the Fifth Circuit said:

"Here, the complaint characterizes the conduct of the defendant, court attaches, and certain Texas Judges as conspiratorial but does not set out allegations in support of that conclusion. For example, there is no allegation as to what Home Insurance did that was unlawful or improper. There is no contention that the insurance company improperly influenced any of the judges or court attaches. The one specific contention Hanna asserted—the charge that

the court reporter prepared a false record—he withdrew after a full hearing. There is nothing in the complaint showing a link, however frail, between Home Insurance Company and the other alleged conspirators. There is no attempt to connect any two of the alleged conspirators.

The complaint is a long lament for a cause that was killed by Texas courts. The appellant would have us infer that he could not have lost his case unless every judge and every court attache who had anything to do with the case conspired with the defendant insurance company to keep him from perfecting his appeal. But as we read the applicable Texas law and as the Court of Civil Appeals read the law, the court was 'powerless' to render any decision other than the 'regrettable' decision it did render."

In another Fifth Circuit decision, *T. Smith and Son, Inc.*, v. *Williams*, 275 F.2d 397 (1960), Judge Wisdom, again speaking of the court, held that the hands-off doctrine expressed in the anti injunction statute (28 U.S.C.A., Sec. 2283) must be considered in light of the function of that statute as a pillar of federalism, and the phrase "where necessary in aid of jurisdiction" contained in such statute should be interpreted narrowly, in direction of federal non-interference with orderly state proceedings.

CONCLUSION.

From the foregoing cited authorities, it is apparent that the affirmance, by the Fifth Circuit Court of Appeals, of the Order dismissing the complaint filed by petitioner in the United States District Court for the Southern District of Florida, is correct and the petition for writ of certiorari should therefore be denied.

The petitioner asks this Honorable Court to believe that the combined weight of the trial and appellate Courts of the State of Florida, formed a conspiracy with the respondents to deny her rights guaranteed by the Federal Constitution. The United States Constitution does not guarantee to any litigant the right to the *results* she wishes, merely that she be provided an appropriate forum within which to litigate her grievance.

Mrs. Warriner has litigated this case, and aired her grievance, in every court in the State of Florida from Key West to Tallahassee. If she is now, or was at the time of their rendition, dissatisfied with the nine orders or decisions of the Supreme Court of the State of Florida, her appropriate remedy was by way of petition for certiorari to this Honorable Court, and not to the District Court for the Southern District.

Dated at Miami Beach, Dade County, Florida, this 15th day of February, 1963.

SIBLEY, GRUSMARK, GIBLIN, KING & LEVENSON,
605 Lincoln Road,
Miami Beach, Florida,
Attorneys for Respondents,

By _____
JAMES LAWRENCE KING.

Certificate of Service.

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondents has been mailed to MRS. FRANCES WARRINER, 2663 S.W. 27th Street, Miami, Florida, this _____ day of February, 1963.

_____
JAMES LAWRENCE KING.